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89-1696

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEABODY COAL COMPANY AND
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

HUBERT C. TAYLOR AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

On December 12, 1988, a writ of certiorari was granted remanding this case for consideration in light of *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988). *Taylor v. Peabody Coal Co.*, 109 S. Ct. 548 (1988). The questions now presented are:

1. Are the rebuttal provisions of the United States Department of Labor's black lung "interim presumption" (20 C.F.R. § 727.203(b) (1989)) invalid under 30 U.S.C. § 902(f)(2) because they require the consideration of all relevant medical evidence in determining whether certain claimants are entitled to benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945.

2. If 30 U.S.C. § 902(f)(2) prohibits the consideration of any relevant medical evidence proving that the miner does not suffer from black lung disease or any related disability or death, then does 30 U.S.C. § 902(f)(2) violate the rights of coal mine operators and their insurers under the Due Process Clause of the Fifth Amendment to the Constitution of the United States by requiring them to pay benefits to black lung claimants for no valid reason.

LIST OF PARTIES AND RULE 29.1 STATEMENT

Hubert C. Taylor ("Taylor") is a claimant for benefits under the Black Lung Benefits Act. He was the petitioner in the Seventh Circuit and is a respondent here. The Peabody Coal Company ("Peabody") is the mine owner that last employed Taylor. The Old Republic Insurance Company ("Old Republic") is Peabody's workers' compensation insurance carrier for certain claims, including Taylor's. Peabody and Old Republic were the respondents below and are co-petitioners in this Court. The Director, Office of Workers' Compensation Programs, is the administrator of the black lung program and is a statutory party in all black lung claims. 30 U.S.C. § 932(k).

Peabody is a wholly-owned subsidiary of the Peabody Holding Company, Incorporated. Old Republic is a wholly-owned subsidiary of the Old Republic International Corporation.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	3
B. Statutory Background	3
C. Background of the Litigation	7
D. Proceedings Post-Remand	8
REASONS FOR GRANTING THE WRIT	10
I. THE CIRCUITS DISAGREE	11
II. NEITHER THE ACT NOR *PITTSTON COAL GROUP* COMPELS THE INVALIDATION OF DOL'S REBUTTAL REGULATIONS	15
A. DOL's Rebuttal Rules Are Not More Restrictive Than SSA's	15
B. The Act Requires DOL to Permit Rebuttal by Medical Evidence	17
C. The Constitutional Questions May Be Significant	18
III. THE ISSUES ARE IMPORTANT	21
CONCLUSION	22

TABLE OF AUTHORITIES

	PAGE
CASES:	
Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs, 890 F.2d 1295 (3d Cir. 1989)	12,13
Broyles v. Director, Office of Workers' Compensation Programs, 824 F.2d 327 (4th Cir. 1987), *aff'd sub nom. Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988)	7
Cook v. Director, Office of Workers' Compensation Programs, 816 F.2d 1182 (7th Cir. 1987)	9
County Court of Ulster County v. Allen, 442 U.S. 140 (1979)	20
Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990)	13,14
Dole v. United Steelworkers of America, 110 S. Ct. 929 (1990)	17
Farmer v. Weinberger, 519 F.2d 627 (6th Cir. 1975)	6
Gibas v. Saginaw Mining Co., 748 F.2d 1112 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985)	6
Kyle v. Director, Office of Workers' Compensation Programs, 819 F.2d 139 (6th Cir. 1987), *cert. denied*, 109 S. Ct. 566 (1988)	11
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	21
Massachusetts v. Morash, 109 S. Ct. 1668 (1989).	18
Meyer v. Zeigler Coal Co., 894 F.2d 902 (7th Cir. 1990)	11
Morton v. Mancari, 417 U.S. 535 (1974)	18

	PAGE
Mullins Coal Co. v. Director, Office of Workers' Compensation Programs, 484 U.S. 135 (1987)	5,12,15,19
Pittston Coal Group v. Sebben, 109 S. Ct. 414 (1988)	*passim*
Ruckleshaus v. Monsanto Co., 467 U.S. 989 (1984)	18
Strike v. Director, Office of Workers' Compensation Programs, 817 F.2d 395 (7th Cir. 1987)	8
John Taylor v. Clinchfield Coal Co., 895 F.2d 178 (4th Cir. 1990)	13,14
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	4,19,20
Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195 (6th Cir. 1989)	12
CONSTITUTIONAL PROVISIONS:	
U.S. Const. amend. V	2,20
STATUTES AND REGULATIONS:	
Administrative Procedure Act, as amended, 5 U.S.C. §§ 551-559, 701-706 (1988)	
Section 5, 5 U.S.C. § 554 (1988)	4
26 U.S.C. § 4121 (1982)	4
26 U.S.C. § 9501 (1982)	4
28 U.S.C. § 1254(1) (1982 & Supp. V 1987)	2
Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1982 & Supp. V 1987)	3
Section 401(a), 30 U.S.C. § 901(a) (1982)	2,4,6,18
Section 402(b), 30 U.S.C. § 902(b) (1982)	17
Section 402(f), 30 U.S.C. § 902(f) (1982)	2
Section 402(f)(1), 30 U.S.C. § 902(f)(1) (1982)	5
Section 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A) (1982)	15,17
Section 402(f)(2), 30 U.S.C. § 902(f)(2) (1982)	*passim*

	PAGE
Section 411(a), 30 U.S.C. § 921(a)(1982)	5
Section 411(c)(4), 30 U.S.C. § 921(c)(4) (1982) .	19
Section 413(b), 30 U.S.C. § 923(b) (1982)	2,4,15
Section 415, 30 U.S.C. § 925 (1982)	4
Section 421, 30 U.S.C. § 931 (1982)	4
Section 422(a), 30 U.S.C. § 932(a) (1982)	4
Section 422(b), 30 U.S.C. § 932(b) (1982)	5,17
Section 422(c), 30 U.S.C. § 932(c) (1982)	2,4,17
Section 422(h), 30 U.S.C. § 932(h) (1982)	17
Section 423, 30 U.S.C. § 933 (1982)	4
Section 424, 30 U.S.C. § 934 (1982)	4
Section 424(a), 30 U.S.C. § 934(a) (1982)	4
Black Lung Benefits Revenue Act of 1981 and Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1982)	3
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 11 (1978)	3
Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972) (codified in scattered sections of 30 U.S.C.)	3
Longshore Act, as amended, 33 U.S.C. §§ 901-952 (1982 & Supp. V 1987)	
Section 19, 33 U.S.C. § 919 (1982)	4
Section 19(d), 33 U.S.C. § 919(d) (1982)	4
Section 21, 33 U.S.C. § 921 (1982)	4
42 U.S.C. §§ 404-408 (1982)	4
Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10712(a) (1987)	3
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(a), (d), 100 Stat. 312, 313 (1986)	3
Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969) .	3

PAGE

Social Security Administration Regulations
20 C.F.R. Part 410, subpart D Appendix (1989) 13
20 C.F.R. §§ 410.401-.476 (1989) 5
20 C.F.R. § 410.412(a)(1) (1989) 15,16
20 C.F.R. § 410.422 (1989) 16
20 C.F.R. § 410.422(c) (1989) 16
20 C.F.R. § 410.424 (1989) 16
20 C.F.R. §§ 410.424-.426 (1989) 16
20 C.F.R. § 410.426(a) (1989) 16
20 C.F.R. § 410.490 (1989) 2,5,9,14
20 C.F.R. § 410.490(b) (1989) 6
20 C.F.R. § 410.490(c) (1989) 16
20 C.F.R. § 410.490(c)(1) (1989) 6
20 C.F.R. § 410.490(c)(2) (1989) 6,9,15
Department of Labor Regulations
20 C.F.R. Part 718 (1989) 5
20 C.F.R. § 727.203 (1989) 2,5,9,12,14
20 C.F.R. § 727.203(a) (1989) 6
20 C.F.R. § 727.203(b) (1989) 6,9
20 C.F.R. § 727.203(b)(2) (1989) 9
20 C.F.R. § 727.203(b)(2), (4) (1989) 14
20 C.F.R. § 727.203(b)(3), (4) (1989) 6,10,11,13,14
MISCELLANEOUS:
Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means, 97th Cong., 1st Sess. (1981) . 7
House Comm. on Education and Labor, 96th Cong., 1st & 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* (Comm. Print 1979) 5

	PAGE
H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. (1978)	18
H.R. Rep. No. 151, 95th Cong., 1st Sess. (1977)	5
124 Cong. Rec. 3426, 3431 (1978)	18
124 Cong. Rec. 2333 (1978)	18
U.S. Department of Labor, *1980 Annual Report on Administration of the Black Lung Benefits Act* (1981)	21
A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* (1986)	13,14
Lapp, *A Lawyer's Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721 (1981)	20
Pendergrass, Lainhart, Bristol, Felson & Jacobson, *Roentgenological Patterns in Lung Changes That Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. (1972)	20
Brief for Federal Petitioners, *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988) (No. 87-821)	7
Government's Petition for a Writ of Certiorari, *Director, Office of Workers' Compensation Programs v. Broyles*, 109 S. Ct. 414 (1988) (No. 87-1095)	7

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UNITED STATES DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Peabody Coal Company and Old Republic Insurance Company respectfully petition for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinions of the Seventh Circuit are reported at 892 F.2d 503 (App. 4a-14a), and 838 F.2d 227 (App. 18a-22a). The Order of the Court of Appeals denying rehearing is unreported (App. 1a-2a). The Order of the Court of Appeals denying briefing and argument on remand is unreported (App. 15a). The Memorandum Decision of this Court granting the writ of certiorari and remanding the case to the Court of Appeals is reported at 109 S. Ct. 548 (App. 23a). The Decision and Order of the Benefits Review Board, United States Department of Labor, is unreported (App. 24a-27a).

The decision of the Administrative Law Judge ("ALJ") is unreported (App. 28a-40a).

JURISDICTION

The judgment of the Court of Appeals on remand from this Court was rendered on August 28, 1989. The Court of Appeals extended the time for filing petitions for rehearing to and including October 2, 1989 (App. 3a). The Government and Peabody both filed timely petitions for rehearing on September 29, 1989. The rehearing petitions were denied by Order dated February 1, 1990 (App. 1a-2a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following authorities are reprinted in the Appendix:

1. The Fifth Amendment to the Constitution of the United States (App. 41a).

2. Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1982) (App. 42a).

3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1982) (App. 43a).

4. Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b) (1982) (App. 45a).

5. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1982) (App. 47a).

6. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1989) (App. 48a).

7. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1989) (App. 51a).

STATEMENT OF THE CASE

A. Introduction

This petition asks the Court to examine once again the controversial black lung "interim presumptions," this time to resolve the key question left open in *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 423 (1988). The question is whether mine owners and their insurers are afforded any realistic opportunity to rebut an interim presumption in non-meritorious benefit claims. The Seventh Circuit held that "medical" proof demonstrating that a coal miner does not suffer from, is not disabled by, or did not die due to black lung disease is generally incompetent as a matter of law to establish a claimant's ineligibility for benefits once the presumption is raised by the claimant. Since medical proof is, by and large, the only proof that matters, the decision below mandates the payment of black lung disability or death benefits by an employer notwithstanding the proven absence of occupational disease, related disability or death. Petitioners believe this ruling is incorrect and unjust, and seek its review by this Court.

B. Statutory Background

The Black Lung Benefits Act,[1] 30 U.S.C. §§ 901-945 (1982 & Supp. V 1987) (the "Act"), establishes a federal program to provide benefits to coal miners and their families on account of total disability or death due to coal mine employment related pneumoconiosis ("black lung" disease).

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[1] Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742, 792 (1969), *as amended by* the Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972), the Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978), the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), the Black Lung Benefits Revenue Act of 1981 and the Black Lung Benefits Amendments of 1981, Pub. L. No. 97-119, 95 Stat. 1635 (1982), the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203, 100 Stat. 312, 313 (1986), and the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10712(a), 101 Stat. 1330, 1797 (1987).

30 U.S.C. § 901(a). The program is divided into two parts. Claims filed from January 1, 1970 to June 30, 1973 are called "Part B" claims. Part B claims were filed with and adjudicated by the Social Security Administration ("SSA"). Benefits awarded are paid by the U.S. Treasury. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 8 (1976).

Claims filed after December 31, 1973,[2] are filed under an approved state workers' compensation law,[3] or if no law has been approved in the miner's state, with the U.S. Department of Labor ("DOL" or "Labor"). Claims filed with DOL are called "Part C" claims.[4] Benefits awarded in a Part C claim are paid directly by a mine owner or its insurer, 30 U.S.C. §§ 932(c), 933, or by a coal industry financed fund administered by DOL, *id.* § 934.[5]

In all segments of the program, benefit entitlements are determined in accordance with agency regulations setting forth eligibility criteria, medical standards and rules of proof In general, there are three elements of entitlement: (1) the miner must have coal mine employment related pneumoconiosis, (2) the miner must be totally disabled or deceased, and

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[2] Claims filed between July 1, 1973 and December 31, 1973 were filed with SSA but adjudicated by DOL. They became Part C claims on January 1, 1974. 30 U.S.C. § 925.

[3] 30 U.S.C. § 931. No state's law has been approved.

[4] Part B claims are adjudicated in accordance with procedures contained in the Social Security Act. 42 U.S.C. §§ 404-408, *incorporated by reference into* 30 U.S.C. § 923(b). Part C claims are adjudicated in accordance with the adversarial litigation procedures contained in the Longshore Act. 33 U.S.C. §§ 919, 921, *incorporated by reference into* 30 U.S.C. § 932(a). The on-the-record hearing provisions of the Administrative Procedure Act ("APA") apply in Part C claims. 5 U.S.C. § 554, *incorporated by reference into* 33 U.S.C. § 919(d).

[5] The Black Lung Disability Trust Fund is financed by a producer's tax on coal. 26 U.S.C. §§ 4121, 9501. The Fund is liable for claims if the miner last worked prior to January 1, 1970 or if no financially responsible mine owner or carrier can be found. 30 U.S.C. §§ 932(c), 934(a).

(3) the total disability or death must be attributable to pneumoconiosis. *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 141 (1987).

Originally, only the Secretary of Health Education and Welfare ("HEW") had authority to write eligibility regulations. 30 U.S.C. §§ 921(a), 932(b). In 1972, HEW published two sets of regulations. HEW's permanent regulations applied in both SSA and DOL claims. 20 C.F.R. §§ 410.401-410.476 (1989). A second set of "interim" standards applied only in SSA claims. *Id.* § 410.490. HEW was asked by an individual member of Congress to amend its rules to permit DOL to use the interim rules in that agency's claims. HEW refused on the grounds that it was unnecessary and might be constitutionally impermissible to apply the interim rules in claims involving mine owners. *See* H.R. Rep. No. 151, 95th Cong., 1st Sess. 15-19 (1977), *reprinted in* House Comm. on Education and Labor, 96th Cong., 1st & 2d Sess., *Black Lung Benefits Reform Act and Black Lung Benefits Revenue Act of 1977* at 508, 522-26 (Comm. Print 1979). DOL believed that the interim rules could be applied rationally and construed constitutionally and so informed Congress. *Id.* ("Any coal operator [may] present sound medical evidence tending to rebut the presumption of eligibility created by the interim presumption. . . . ").

In 1978, Congress authorized DOL to write its own eligibility rules, 30 U.S.C. § 902(f)(1), and also mandated a review of all pending and previously denied claims, *id.* § 945. Claims reviewed by DOL and a group of newly filed claims were to be considered under criteria that "shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973." *Id.* § 902(f)(2). DOL then promulgated interim regulations to comply with section 902(f)(2), *see* 20 C.F.R. § 727.203 (1989), and permanent regulations, *see id.* Part 718.

The SSA and DOL interim regulations are similar, but not identical. Both regulations erect rebuttable presumptions of entitlement. In both, the claimant proves predicate facts,

eligibility is presumed, and ultimate facts are decided in the rebuttal inquiry. The employer bears the burden of persuasion in the rebuttal phase. *See, e.g., Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1120 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). The SSA rule may be invoked if the claimant establishes pneumoconiosis by x-ray, biopsy or autopsy evidence, or if the miner meets published values on pulmonary function tests. 20 C.F.R. § 410.490(b). Labor's rule follows this same format, but adds three additional bases for invocation (arterial blood gas tests, medical opinion evidence, and lay evidence in certain survivor's claims). *Id.* § 727.203(a). Labor's rule required at least ten years of coal mine employment for invocation by any method, while SSA's allowed a shorter term miner to invoke by x-ray, autopsy or biopsy evidence if additional evidence connected abnormal findings to coal dust exposure. *See Pittston Coal Group*, 109 S. Ct. at 418-19.

SSA's rule states that the presumption may be rebutted by evidence showing that the miner is still working or is able to work. The SSA rebuttal rule also cross-references certain provisions in the SSA permanent regulations. 20 C.F.R. § 410.490(c)(1), (2). SSA's rule makes no statement limiting the sort of evidence that may prove rebuttal facts. The Labor rebuttal rule generally follows section 410.490(c), but adds several provisions to it. First, the Labor rule states that all relevant medical evidence shall be considered. *Id.* § 727.203(b). The Labor rule also provides that rebuttal may be established by proof showing that (1) the miner's disability or death did not arise in whole or in part out of coal mine employment, or (2) that the miner did not or does not have pneumoconiosis. *Id.* § 727.203(b)(3), (4).[6]

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[6] Benefits are provided by the Act on account of total disability *or* death due to pneumoconiosis. 30 U.S.C. § 901(a). Labor's rule specifically accommodates rebuttal in a claim filed by a survivor of a miner. SSA's rule does not specifically do so, but SSA did not interpret its rules to preclude rebuttal in a case filed on behalf of a deceased miner. *See Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975).

The DOL presumption is applicable in approximately 424,000 claims. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 186 (1981).

C. Background of the Litigation

In *Pittston Coal Group v. Sebben*, this Court invalidated DOL's absolute bar to invocation in the case of a miner with abnormal x-ray, biopsy, or autopsy findings, but less than ten years of coal mine employment. The Court held that the undisputed tension between the SSA and DOL "ten year" rules was prohibited by 30 U.S.C. § 902(f)(2). 109 S. Ct. at 420-23.

In a case consolidated with *Pittston Coal Group*, the Fourth Circuit held that the SSA rule, including both its invocation and rebuttal provisions, simply applied in DOL's claims. *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *aff'd in part sub nom. Pittston Coal Group*, 109 S. Ct. at 425.[7] The petitions for certiorari and the briefs filed by the Government and private petitioners in *Pittston Coal Group* and *Broyles* disputed the Fourth Circuit's de facto invalidation of DOL's rebuttal rules. The private petitioners also asserted that application of SSA's rebuttal rules, as they were interpreted by the Fourth Circuit, deprived mine owners and insurers of constitutional rights. The Solicitor General agreed that the Fourth Circuit's treatment of the question was constitutionally troublesome.[8]

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[7] Specifically, the Fourth Circuit held that the SSA presumption could be rebutted only by proof that the miner was working or able to work. Since DOL's rebuttal provisions apparently went beyond these parameters, they too were more restrictive than the SSA rules and could not stand. *Broyles*, 824 F.2d at 329.

[8] *See* Government's Petition for a Writ of Certiorari at 17 n.10, *Director, Office of Workers' Compensation Programs v. Broyles*, 109 S. Ct. 414 (1988) (No. 87-1095); Brief for the Federal Petitioners at 26, *Pittston Coal Group*, 109 S. Ct. 414 (1988) (No. 87-821).

The black lung claimants involved in *Pittston Coal Group* and *Broyles*, however, conceded that DOL's rebuttal rules, although perhaps more restrictive than SSA's, were, nevertheless, authorized by the Act and valid. For these reasons, this Court found it unnecessary to consider the validity of DOL's rebuttal rules, to "reconcile their putative validity" with the holding in *Pittston Coal Group*, or to address the due process concerns alleged. 109 S. Ct. at 422-23.

Prior to *Pittston Coal Group*, the Seventh Circuit held that the invocation difference between the SSA and DOL presumptions did not violate 30 U.S.C. § 902(f)(2). *Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395, 404-05 (7th Cir. 1987). Hubert Taylor was found ineligible for benefits under the DOL presumption on the strength of persuasive rebutting medical evidence demonstrating that he is not totally disabled by pneumoconiosis. Taylor appealed to the Seventh Circuit to seek a readjudication of his case under the SSA/Part B presumption. Relying on *Strike*, the Seventh Circuit denied relief. *Taylor v. Peabody Coal Co.*, 838 F.2d 227, 229 (7th Cir. 1988). Taylor filed a petition for writ of certiorari. After the decision in *Pittston Coal Group*, this Court granted the writ and remanded. *Taylor v. Peabody Coal Co.*, 109 S. Ct. 548 (1988).

D. Proceedings Post-Remand

On August 28, 1989, the Seventh Circuit reversed the denial of benefits and reinstated the award made by the ALJ

under section 410.490.[9] *Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989) ("*Taylor II*"). The Seventh Circuit previously observed that the SSA presumption could not be rebutted by medical evidence. *Cook v. Director, Office of Workers' Compensation Programs*, 816 F.2d 1182, 1185 (7th Cir. 1987). Relying on *Cook*, the court below noted:

> Because the Labor rebuttal rules allow the consideration of medical evidence on rebuttal, while the HEW rebuttal rules do not, the former are clearly more restrictive than the latter.

Taylor II, 892 F.2d at 506. The Seventh Circuit concluded "that *Pittston Coal Group's* reasoning requires us to apply the HEW rebuttal rules as well [as the invocation rules]." *Id.* at 508.[10]

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[9] The ALJ considered Taylor's claim first under section 727.203. The presumption was invoked by x-ray evidence. It was, however, rebutted under DOL's section 727.203(b)(2) because the medical evidence as a whole demonstrated that Taylor was not disabled for work as a result of any respiratory or pulmonary impairment (ergo he could not be totally disabled as a result of pneumoconiosis) (App. 37a-38a). Taylor is unable to work because he is 75 years old, obese, and suffers from syphillis, knee problems and non-occupational arteriosclerotic heart disease. The ALJ then reviewed the claim under section 410.490(c)(2). Noting a 1984 Sixth Circuit decision holding that only vocational evidence, but not medical evidence, could rebut the SSA presumption, the ALJ awarded benefits (App. 39a). Peabody appealed the ALJ's application of section 410.490. Taylor did not cross-appeal the denial of his claim under section 727.203(b), and has never contested the finding. The Benefits Review Board agreed that the ALJ erred in applying section 410.490(c)(2), and reversed on this basis (App. 26a-27a).

[10] The Seventh Circuit rejected a due process challenge, but not the one we ask this Court to consider. *See* 892 F.2d at 508. Following remand, both the Government and Peabody requested rebriefing and reargument in light of *Pittston Coal Group*. These requests were denied. In requesting rehearing, Peabody suggested that the court had considered the wrong constitutional theory.

The Government and Peabody petitioned for rehearing. Both sides argued, in light of statutory, legislative, and regulatory authorities, that SSA's presumption is functionally rebuttable by medical evidence demonstrating an absence of occupational disease or related total disability or death. Thus, there is no true tension between SSA's and DOL's rebuttal rules and the restrictivity prohibition of 30 U.S.C. § 902(f)(2) does not deactivate any part of the DOL rebuttal rules. The Seventh Circuit's conclusion directly violates at least four other specific provisions of the Act and operates to impose liability on mine owners for no particular reason at all.[11] The Government and Peabody also argued that 30 U.S.C. § 902(f)(2) would present significant constitutional difficulties as interpreted by the Court of Appeals.

The rehearing petitions were denied on February 1, 1990.

REASONS FOR GRANTING THE WRIT

The U.S. coal industry does not question its obligation to provide fair and adequate compensation to those who suffer the consequences of coal mine employment related black lung disease. The industry has made a substantial effort over the past two decades, working closely with Congress, the Department of Labor, the insurance industry and workers' representatives, to ensure the attainment of this mutual goal. The resultant federal program is uniquely generous to claimants, but still affordable and fair to the coal industry.

The Seventh Circuit has now informed the industry as well as DOL, twelve years after the fact, that they were duped.

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[11] The Seventh Circuit attempted no analysis of the SSA rebuttal rule or the Act as a whole. The court merely noted that the DOL rule contained two rebuttal standards not expressly stated in the SSA rule, 20 C.F.R. § 727.203(b)(3) and (4), and that the DOL rule expressly required the consideration of all relevant medical evidence while the SSA rule was silent on this point. *Taylor II*, 892 F.2d at 506 & n.3.

We are told, in effect, that Congress did not really mean to establish a black lung benefits program only to compensate the victims of this occupational disease, but that there was a hidden agenda. Indeed, what Congress really intended was to create an employer funded life, health, general disability, retirement and unemployment insurance program for coal miners and their families. The fact that it is called the black lung program is merely an irrelevant technicality.

The Third Circuit and the Sixth Circuit do not agree. More importantly, the Seventh Circuit has erroneously construed the Act, Congress's intent and the relevant agency rules. Its decision is a matter of considerable economic significance to Peabody, mine owners generally and their insurers, and it wrongly deprives all of them of the right to fairly contest questionable and clearly non-meritorious black lung claims.

I.

THE CIRCUITS DISAGREE

In holding that medical evidence is largely or entirely irrelevant in the rebuttal phase of a claim subject to an interim presumption,[12] the Seventh Circuit discussed and expressly rejected the contrary view of the Sixth Circuit. *Taylor II*, 892 F.2d at 506-07 ("We respectfully disagree, therefore, with our colleagues in the Sixth Circuit . . . ."). Before *Pittston Coal Group*, the Sixth Circuit held that Labor's ten-year invocation rule violated 30 U.S.C. § 902(f)(2), but that the Labor's rebuttal rules were not similarly flawed. *Kyle v.*

[12] The Seventh Circuit's preclusion of any reliance on medical evidence in the rebuttal phase prohibits rebuttal on the basis of even conclusive proof that the miner did not have pneumoconiosis or that the miner's disability or death was in no way related to pneumoconiosis under 20 C.F.R. § 727.203(b)(3) and (4).These rebuttal elements raise strictly medical questions that can only be addressed by medical evidence. In the Seventh Circuit they no longer apply. *Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 905 n.3 (7th Cir. 1990).

Director, Office of Workers' Compensation Programs, 819 F.2d 139 (6th Cir. 1987), *cert. denied*, 109 S. Ct. 566 (1988). After *Pittston Coal Group*, the Sixth Circuit reiterated, 'We have explicitly declined, however, to extend our holding in *Kyle* to the regulations governing rebuttal of the interim presumption. . . . 'Part B cases are not applicable to Part C claims with respect to *rebuttal* . . . .' ". *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 201 (6th Cir. 1989) (emphasis in original; citation omitted). "[M]edical evidence alone would suffice to rebut the Part C presumption." *Id.* at 202.

The Third Circuit addressed the issue in a case in which the miner's disability was not related, even in part, to coal dust exposure, thus establishing rebuttal of the DOL presumption under section 727.203(b)(3). On appeal, claimant contended that the SSA rule did not permit rebuttal by this method, and accordingly, the Labor rule was invalid. The Third Circuit upheld the validity of Labor's rule. *Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs*, 890 F.2d 1295, 1300 (3d Cir. 1989), *reh'g denied*, 890 F.2d 1295 (3d Cir. 1990).[13]

Acknowledging the conflict between the Sixth and Seventh Circuits, the Third Circuit held:

> The purpose of the Benefits Act is to provide a recovery for a miner totally disabled at least in part by pneumoconiosis if the disability arises out of coal mine employment. 30 U.S.C. § 901(a); *Mullins v. Director*, 108 S. Ct. at 431. The administrative law judge made unchallenged findings . . . under 20 C.F.R. § 727.203 which established that [the miner's] disability did not arise even in part out of coal mine employment. Thus, even though the Benefits Act has a remedial purpose, it seems perfectly

[13] It is probable that a petition for a writ of certiorari will be filed in *Bethenergy Mines Inc.*

> evident that no set of regulations under it may provide that a claimant who is statutorily barred from recovery may nevertheless recover.
>
> . . . [T]he only way in which we can affirm . . . is to hold that even though Bethenergy should, on the law and facts, have prevailed . . . , by reason of the presumptions and limitations on rebuttal it must be responsible for benefits. We decline to reach such an unjust result.

Id. at 1300 (citations and footnotes omitted).

The Fourth Circuit followed with two decisions more or less siding with the Seventh Circuit. *John Taylor v. Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), *reh'g denied*, No. 87-3852 (4th Cir. Apr. 20, 1990); *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), *reh'g denied*, No. 89-3203 (4th Cir. Apr. 20, 1990). In *John Taylor*, the ALJ invoked the Labor presumption on the basis of abnormal arterial blood gas test results,[14] but then found rebuttal under both of the "extra" DOL rebuttal provisions, sections 727.203(b)(3) and (b)(4). 895 F.2d at 179. The ALJ held that John Taylor did not have pneumoconiosis or any related

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[14] The SSA presumption does not permit invocation by blood gas test results. SSA treats blood gas evidence in a separate and more restrictive way than does DOL. 20 C.F.R. Part 410, subpart D Appendix. Arterial blood gas test results cannot diagnose pneumoconiosis or related disability. Abnormal blood gas components may be due to a vast array of illnesses, environmental factors, or the personal habits of the patient. A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease* 162, 176, 186-87, 376-78 (1986).

disability. In *Dayton*, the presumption was invoked by pulmonary function test results,[15] but was found rebutted because Dayton was not disabled and did not suffer from pneumoconiosis. 20 C.F.R. § 727.203(b)(2), (4); 895 F.2d at 174.

In *John Taylor*, relying on its prior decision in *Broyles*, the Fourth Circuit held that section 410.490 applies in DOL claims as to all rebuttal elements.

> The rebuttal provisions of § 727.203(b)(3) and (4) allow the consideration of evidence disputing both the presence of pneumoconiosis and the connection between total disability and coal mine employment. As rebuttal under § 727.203 permits additional criteria by which more elements of statutory entitlement may be rebutted, the provisions are more restrictive than those found in 410.490 and their application violates 30 U.S.C. § 902(f)(2).

895 F.2d at 182-83. (In a footnote, the Court notes its disagreement with the Sixth Circuit. *Id.* n.2.)[16] *Dayton* followed *John Taylor*. 895 F.2d at 175.

It is likely that over 90% of all claims arise within the combined jurisdictions of the Third, Fourth, Sixth and Seventh Circuits. The disagreements among these circuits are clear.

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[15] The pulmonary function invocation values in both the DOL and SSA rules are "basically normal" values for retired miners and just below normal for younger miners. *See Pittston Coal Group*, 109 S. Ct. at 421; *id.* at 432-33 n.8 (Stevens, J., dissenting). Truly abnormal pulmonary function tests may detect disability, but are not diagnostic of black lung disease. A. Miller, *supra* note 14, at 4-5.

[16] Chief Judge Ervin dissented, noting constitutional and statutory problems with the result. 895 F.2d at 184 ("To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me.").

II.

NEITHER THE ACT NOR *PITTSTON COAL GROUP* COMPELS THE INVALIDATION OF DOL'S REBUTTAL REGULATIONS

A. DOL's Rebuttal Rules Are Not More Restrictive Than SSA's

The essential finding in *Pittston Coal Group* is that DOL's ten year invocation rule is more restrictive than SSA's counterpart. This is clear on the face of the rules. It is not clear that the same flaw infects the rebuttal side. DOL's rules specify, as does 30 U.S.C. § 923(b), that all relevant medical evidence must be considered. SSA's rule is silent.[17] It is not apparent why silence is construed as a "criterion" when the Act ultimately controls and is precisely in accord with the DOL requirement. *See Mullins Coal*, 484 U.S. at 149-50 (noting "the requirement of 30 U.S.C. § 923(b) that all relevant medical evidence be considered in adjudicating SSA claims was explicitly carried over into the Labor presumption's rebuttal section").

Neither is it apparent that SSA's presumption precludes rebuttal by proof that pneumoconiosis is not present or did not contribute to a miner's disability or death. Section 410.490(c)(2) is a shortened version of the statutory definition of a compensable disability. 30 U.S.C. § 902(f)(1)(A). SSA rebuttal rule (c)(2) cross-references another SSA regulation, section 410.412(a)(1), which again repeats the definition

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[17] A plain reading of SSA rebuttal section 410.490(c)(2) suggests no limitation on the type of evidence that could rebut. In another sense, if SSA wrote a rule precluding the consideration of medical evidence, the rule would directly contradict the Act and would be invalid. *See* 30 U.S.C. § 923(b). The Fourth and Seventh Circuits simply applied the SSA rule. But the SSA rule does not apply to DOL claims and it has never been subject to notice and comment with respect to any claims for which a mine operator may be liable. This suggests an interesting technique for circumvention of the rulemaking requirements of the APA and is considerable baggage to attach to the word "criteria."

and then cross-references still other rules, sections 410.424 to 410.426. Another SSA rule, section 410.422 also defines "total disability," cross-referencing section 410.424. We cannot make perfect sense of the hopeless tangle of SSA rules that are incorporated by reference into section 410.490(c), but they are incorporated and they contain significant provisions. For example, section 410.412(a)(1) defines total disability to be total disability "due to pneumoconiosis." Section 410.422(c) provides, "Primary consideration is given to the medical severity of the individual's pneumoconiosis (see § 410.424)." Section 410.426(a) provides, "A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. *Medical impairments other than pneumoconiosis may not be considered.*" (emphasis added).

This trail back through the body of SSA's permanent rules is just like the one followed in *Pittston Coal Group*, and there, it was the only authority permitting this Court to conclude that DOL's ten-year rule was more restrictive than SSA's equivalent rule. 109 S. Ct. at 417-19.

The same analytic format validates DOL's rebuttal rules. The SSA rules incorporated into section 410.490(c) plainly emphasize the primary significance of medical evidence and preclude an award where pneumoconiosis is not a significant factor in a miner's disability. Ipso facto, if the disease is absent, it was not a significant factor. DOL's rules clarify SSA's morass by making explicit what is buried, but they are not more restrictive.[18]

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[18] In testing comparative restrictivity, the courts (with the exception of the Third Circuit) do not measure SSA rules against DOL rules. They compare DOL's rules to their decisional law, all of which ignores the specific text of SSA's rules for no stated reason. Because the courts of appeals' decisions in question all post-date the relevant enactment, they could not have served to inform Congress.

B. The Act Requires DOL to Permit Rebuttal by Medical Evidence

However clear the term "criteria" may have been in the *Pittston Coal Group* setting, it is not an inherently precise term. It must be interpreted in context and in light of related provisions. *See Dole v. United Steelworkers of Am.*, 110 S. Ct. 929, 934-35 (1990). The Seventh Circuit interprets "criteria" to mean that black lung disability benefits must be paid by mine owners even though the best medical evidence proves that the miner has no such disease or disability. This result cannot be squared with specific provisions of the Act.

First, section 422(c) provides, "[N]o benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis . . . which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969, when it was operated by such operator." 30 U.S.C. § 932(c); *see id.* § 932(h). Section 413(b) directs the adjudicator to consider all relevant evidence, expressly including the types of medical evidence that might demonstrate the absence of disease or disability. 30 U.S.C. § 923(b). This is not merely a rule of admissibility. It is a substantive direction admonishing the agencies that they may not casually overlook relevant facts properly brought to their attention. The Seventh Circuit's decision repeals these important protections.

Generally, the Act does not confirm any interpretation that simply writes pneumoconiosis or related disability out of the picture. Section 402(f)(1)(A), the section authorizing the agencies to write eligibility regulations, mandates rules that provide benefits only when "pneumoconiosis"[19] prevents the miner from working. 30 U.S.C. § 902(f)(1)(A). The Act's statement of purpose very clearly limits its objective to the

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[19] Pneumoconiosis is defined by the Act to mean a respiratory or lung disease or its sequelae arising out of coal mine employment. 30 U.S.C. § 902(b).

compensation of total disability or death due to pneumoconiosis. *Id.* § 901(a).

There is, in sum, nothing in the Act that accommodates the interpretation of "criteria" adopted by the Seventh Circuit. In *Pittston Coal Group*, this Court reallocated burdens of proof in DOL black lung claims, finding that the agency had not allocated them correctly in writing its rules. It is a far different matter, and almost surely inappropriate, to directly change the stated purpose of the Act by the interpretation of only one of its words. *See Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989). The proper mode of construction effectuates all of the provisions of the Act. *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)). The Seventh Circuit's approach does not do so.

Legislative guides uniformly confirm Congress's intent to permit rebuttal in light of relevant medical evidence. The Conference Report accompanying the 1978 amendments instructs DOL to write its own interim presumption ensuring the consideration of all relevant medical evidence. H.R. Conf. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 308, 309. Several members of the Conference Committee emphasized the point in final debate before enactment. 124 Cong. Rec. 2333 (1978) (statement of Sen. Javits); 124 Cong. Rec. 3426, 3431 (1978) (statements of Reps. Perkins and Simon). There is absolutely nothing to indicate any intent either to limit or preclude the consideration of any kind of medical evidence or otherwise require benefit payments on account of anything but pneumoconiosis and related total disability or death.

The DOL rebuttal rules cannot fall on any traditional analysis of their validity.

C. The Constitutional Questions May Be Significant

The Seventh Circuit's opinion is generic. It holds that medical evidence is incompetent. It follows with certainty

that no claim in a rebuttal posture can be denied merely because pneumoconiosis is absent or a miner's disability or death is unrelated to his or her employment. The presumption, thus, compels false conclusions by precluding inquiry into the truth in every case. It is a purely arbitrary rule because it conclusively allocates blame and liability to an employer for harm to its employee that either does not exist or is not attributable to the employment relationship.

This Court has twice before expressed its constitutional concerns in similar settings. In the early 1970s, mine operators brought a direct constitutional challenge to a perceived limitation on rebuttal of a statutory black lung presumption, 30 U.S.C. § 921(c)(4). In reversing the lower court's declaration of unconstitutionality, this Court construed the presumption so that it would not, in any way, restrict a mine operator's ability to litigate a non-meritorious claim. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 35-37. Chief Justice (then Justice) Rehnquist and Justice Stewart concurred, noting that the presumption did not restrict the full litigation of any element of the claim. *Id.* at 51. It is apparent, however, that all members of the Court were troubled by the notion of precluding a fair opportunity to defend. A similar concern was expressed in this Court's first review of the interim presumption. *Mullins Coal Co.*, 484 U.S. at 157-59 & n.30 ("But if a miner is not actually suffering from the type of ailment with which Congress was concerned, there is no justification for presuming that that miner is entitled to benefits."); *see also id.* at 440 n.32 ("Lurking beneath the surface of this case is the constitutional concern that there must be 'some rational connection between the fact proved and the ultimate fact presumed.'" (citation omitted)).

The validity of evidentiary devices under the Due Process Clause depends "on the strength of the connection between the particular basic and elemental facts and on the degree to which the device curtails the fact finder's freedom to assess the evidence independently." *Id.* at 439 n.30 (quoting

County Court of Ulster County v. Allen, 442 U.S. 140, 156 (1979)). It is hard to see how, under the Seventh Circuit's reading, this test is met by section 410.490. Under the lower court's theory, a presumption of total disability or death due to pneumoconiosis is established by x-rays, ventilatory or blood gas tests meeting specified values, or other proof that the miner has or had severe lung disease. Yet the employer is permitted to rebut only if the miner is working or able to work. On its face, such a presumption is illogical, but upon closer analysis, it is patently irrational. Chest x-rays are incapable of showing the cause of total disability or death. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 6-7 & n.2. Abnormalities shown on the x-ray are not necessarily related to coal dust exposure.[20] Blood gas and pulmonary function studies are non-diagnostic and any abnormalities they show may be due to a host of illnesses or personal characteristics of the patient. *See supra* notes 14, 15. The pulmonary function invocation values in the rules are normal for older persons. The SSA rule, as read by the court below, would not accommodate rebuttal at all if the miner was deceased.

In this setting, a deceased drug user (drug use affects blood gases) who dies from an overdose may be irrebuttably presumed to have died due to pneumoconiosis. A normal, healthy retiree may be irrebuttably presumed totally disabled due to pneumoconiosis. A lifelong cigarette smoker with disease attributable solely to that habit is automatically entitled. These are not isolated cases, and the reporters are filled with claims very much like these, most of which are denied under DOL's rules. If 30 U.S.C. § 902(f)(2) requires employers to pay benefits in these cases by irrevocably deeming drug use, cigarette smoking, automobile accidents and the like to be disabling or fatal black lung disease, the presumption is

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[20] Pendergrass, *et al.*, *Roentgenological Patterns in Lung Changes That Simulate Those Found in Coal Workers' Pneumoconiosis*, 200 Annals N.Y. Acad. of Sci. 494 (1972); Lapp, *A Lawyer's Medical Guide to Black Lung Litigation*, 83 W. Va. L. Rev. 721, 730 (1981).

purely arbitrary. The rule forecloses all reasonable inquiry into the truth of the matter. It completely curtails the fact finder's ability to assess the evidence independently because it makes medical evidence, the only evidence that matters, incompetent as a matter of law. And the connections between predicate and ultimate facts are exceptionally weak. It is hard to see how this passes due process muster at any level of scrutiny.

In a procedural sense, the mine operator has a right to a fair hearing before it may be obligated to transfer its property to a claimant. The right to show up at trial is not the right protected by the Due Process Clause — it is the "opportunity to present [the] case and have its merits fairly judged" that matters. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). If the only way to prove an employer's lack of involvement in a miner's disability or death is by medical evidence, as it is in a black lung claim, the preclusion of the fact finder's consideration of medical evidence makes the trial irrelevant process, not due process of law.

In Hubert Taylor's case, Peabody has proven and Taylor has not challenged the fact that Taylor's employment with Peabody caused no disability. The constitutional predicate for requiring disability payments by Peabody is elusive at best.

III.

THE ISSUES ARE IMPORTANT

Peabody and Old Republic together face liability in from 500 to 700 claims directly affected by the decision below. It is estimated that from 3,000 to 7,000 additional claims remain pending. The average indemnity cost of an older black lung claim ranges from $118,000 to more than $186,000. U.S. Dep't of Labor, *1980 Ann. Rep. on Admin. of the Black Lung Benefits Act* 32 (1981). Interest, health care and transactional

costs may double these amounts. The amount at stake is substantial.

Of equal significance is the fact that these liabilities are unfunded. Twelve years ago, Congress mandated the application of some kind of interim presumption in many DOL claims. The regulations duly promulgated at that time assured industry that it would be responsible for benefits only on account of total disability or death due to occupational pneumoconiosis, and afforded a fair opportunity to defend non-meritorious claims. The insuring and self-insuring arrangements entered into to fund these liabilities were financed on reasonable expectations of loss experience that seemed justified at that time in light of DOL's rules. It is not possible to go back to fix a mistake. Risk of error is, of course, a feature of all insuring arrangements. It is, however, unjust for Congress to require private funding of a specific occupationally related disability or death, while a hidden agenda contemplates liability vastly exceeding the scope of the risk assigned. It is not probable that Congress intended this deception.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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89-1696

Supreme Court, U.S.
FILED
MAY 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEABODY COAL COMPANY AND
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

HUBERT C. TAYLOR AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

DOCUMENT	PAGE
Order of the United States Court of Appeals for the Seventh Circuit Denying Petitions for Rehearing and Suggestion for Rehearing En Banc in *Taylor v. Peabody Coal Company*	1a
Order of the United States Court of Appeals for the Seventh Circuit Granting Motions for Enlargement of Time to File Petitions for Rehearing with Suggestion of Rehearing En Banc in *Taylor v. Peabody Coal Company*	3a
Opinion of the United States Court of Appeals for the Seventh Circuit on Remand from The Supreme Court of the United States in *Taylor v. Peabody Coal Company*	4a
Order of the United States Court of Appeals for the Seventh Circuit Denying Motion to Schedule Case for Briefing and Oral Argument Following Supreme Court Remand in *Taylor v. Peabody Coal Company*	15a
Order of the United States Court of Appeals for the Seventh Circuit Denying Petition for Review of an Order of the Benefits Review Board in *Taylor v. Peabody Coal Company*	17a
Opinion of the United States Court of Appeals for the Seventh Circuit in *Taylor v. Peabody Coal Company*	18a
Memorandum Decision of the Supreme Court of the United States Granting Petition for Writ of Certiorari in *Taylor v. Peabody Coal Company*	23a
Decision and Order of the United States Department of Labor Benefits Review Board in *Taylor v. Peabody Coal Company*	24a

PAGE

Decision and Order of the United States Department of Labor Administrative Law Judge in *Taylor v. Peabody Coal Company* 28a

U.S. Const. amend. V 41a

30 U.S.C. § 901(a) 42a

30 U.S.C. § 902(f) 43a

30 U.S.C. § 923(b) 45a

30 U.S.C. § 932(c) 47a

20 C.F.R. § 410.490 . . . . . 48a

20 C.F.R. § 727.203 . . . . . 51a

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

FEBRUARY 1, 1990.

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

HUBERT C. TAYLOR,
Petitioner,

No. 86-2590

v.

PEABODY COAL CO. AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondents.

On Petition for Review of an Order of the Benefits Review Board United States Department of Labor.

ORDER

On consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above-entitled cause by the respondents, no judge in active service* has requested a vote thereon, and all of the judges on the original panel have voted to deny the petitions for rehearing and suggestions for rehearing *en banc*.

The petitions filed by the respondents in this case contend that HEW's rules do not foreclose the use of medical rebuttal evidence and thus our opinion was fatally flawed. However, we note that the precise extent to which the HEW regulations allowed rebuttal was not an issue in this case. We

* Circuit Judge Walter J. Cummings did not participate in any consideration of the petitions for rehearing and suggestions for rehearing *en banc* filed in the above cause.

held that to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid. We did not hold that there are no conceivable circumstances under which HEW rules might allow medical rebuttal.

It is also argued in the petitions that the current statute (30 U.S.C. § 923(b)) directs the Department of Labor to consider "all relevant evidence." This contention is certainly true but it misses the point. While any trier of fact may be required to consider all "relevant" evidence, such a requirement does not alter any substantive rule of law. To what determination is a piece of evidence "relevant"? That is a distinct question, and a standard of admissibility cannot control substantive law. Cf. *Collins v. Old Ben Coal Co.*, 861 F.2d 481, 493 (7th Cir. 1988) (Easterbrook, J., concurring).

With these comments,

IT IS HEREBY ORDERED that the aforesaid petitions for rehearing and suggestions for rehearing *en banc* be, and the same are hereby, DENIED.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

SEPTEMBER 14, 1989.

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. _____
Hon. _____

HUBERT C. TAYLOR,
Petitioner,

No. 86-2590

vs.

PEABODY COAL COMPANY, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents.

Petition for Review of an Order of the Benefits Review Board

This matter comes before the court for its consideration of the following documents:

1. "MOTION FOR ENLARGEMENT OF TIME TO FILE PETITION FOR REHEARING WITH SUGGESTION OF REHEARING EN BANC" filed herein on September 13, 1989, by counsel for the Peabody Coal Company.

2. "MOTION FOR EXTENSION OF TIME TO FILE PETITION FOR REHEARING" filed herein on September 14, 1989, by counsel for the Director, Office of Workers' Compensation Programs.

On consideration thereof,

IT IS ORDERED that said motions are hereby GRANTED and the Petition for Rehearing with Suggestion of Rehearing En Banc and the Petition for Rehearing will be due on or before October 2, 1989.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 86-2590

HUBERT C. TAYLOR,

Petitioner,

v.

PEABODY COAL CO. AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE BENEFITS REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

ARGUED OCTOBER 28, 1987—DECIDED
JANUARY 25, 1988—
REVERSED AND REMANDED JANUARY 11, 1989—
DECIDED AUGUST 28, 1989 **

Before EASTERBROOK, RIPPLE, AND KANNE, Circuit Judges.

KANNE, Circuit Judge. This appeal has come before us for the second time. In our earlier opinion in this case, *Taylor v. Peabody Coal Co.*, 838 F.2d 227 (7th Cir.), *vacated*, ___ U.S. ___, 109 S. Ct. 548, 102 L. Ed. 2d 576 (1988)

** Pursuant to Circuit Rule 40(f), this opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing en banc on the issue of whether the Labor rebuttal rules violated 30 U.S.C. § 902(f)(2).

("*Taylor I*"), we denied petitioner Hubert C. Taylor's petition for review of the Benefits Review Board's order reversing the decision of the Administrative Law Judge ("ALJ") that Taylor was entitled to black lung benefits. On January 11, 1989, the United States Supreme Court reversed and remanded our decision for reconsideration in light of its recent decision in *Pittston Coal Group v. Sebben*, ___ U.S. ___, 109 S. Ct. 414, 102 L. Ed. 2d 408 (1988). On reconsideration, we reverse the decision of the Benefits Review Board and reinstate the ALJ's award of benefits to Taylor.

I. Background

The black lung benefits program, as enacted by Congress, consists of two parts. Part B is a temporary program of federally financed benefits to be administered by the Secretary of Health, Education, and Welfare ("HEW"), and Part C provides for a more permanent program to be administered by the Secretary of Labor, relying on state workers' compensation programs where possible. *Pittston Coal Group*, 109 S. Ct. at 417. The Part B program, which applies to claims filed by living miners before June 30, 1973 and before December 31, 1973 for survivors' claims, is administered under regulations promulgated by HEW. Although HEW promulgated both permanent and interim regulations, only the interim regulations, 20 C.F.R. § 410.490 (1973), are at issue here. These regulations set out criteria under which the presumption of entitlement to black lung benefits under Part B can be invoked by the claimant and rebutted by the employer.[1]

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[1] Because we only are concerned at this point with the validity of the Labor rebuttal rules, we will discuss those rules and the HEW rebuttal rules where appropriate. The validity of the Labor invocation rules already has been decided in *Pittston Coal Group*, where the Supreme Court discussed in detail these rules, the HEW invocation rules and the differences between the two sets of rules, 109 S. Ct. at 417-19. Hence, for brevity's sake, we will not discuss the invocation rules here.

In enacting the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (codified in scattered sections of 30 U.S.C.), which gave the Secretary of Labor authority to establish total disability regulations for Part C cases, Congress provided that "[c]riteria applied by the Secretary of Labor . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973 . . . " 30 U.S.C. § 902(f)(2). In response to the Black Lung Benefits Reform Act, the Secretary promulgated the interim regulations for Part C cases at issue here.[2] *See* 20 C.F.R. § 727.203.

The petitioner in this case, Hubert C. Taylor, filed his claim for black lung benefits on June 6, 1977. The Office of Workers' Compensation Programs approved his claim on March 31, 1980. Respondent Peabody Coal Company, however, filed a notice of controversion and the matter was referred to the Office of Administrative Law Judges. On August 29, 1985, the ALJ issued his decision and order awarding benefits to Taylor.

In this decision and order, the ALJ examined Taylor's claim under both the Part C regulations and the Part B regulations. Examining Taylor's claim under the Part C regulations, the ALJ found that Taylor successfully had invoked the presumption under 20 C.F.R. § 727.203(a), but that Peabody Coal successfully had rebutted the presumption under 20 C.F.R. § 727.203(b)(2). Peabody Coal was able to rebut the presumption by presenting medical evidence that Taylor had only a mild pulmonary impairment which did not prohibit him from performing his work. Under the Part B regulations, however, the ALJ found that Taylor successfully had invoked the presumption, and that Peabody Coal had failed to rebut the presumption.

Peabody Coal appealed the ALJ's decision to the Benefits Review Board. The Benefits Review Board reversed the

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[2] The permanent Labor regulations took effect on April 1, 1980. 20 C.F.R. § 718.2; *see also Pittston Coal Group*, 109 S. Ct. at 419.

ALJ's decision, determining that Taylor's claim should be resolved exclusively under the Part C (Labor) rules. The Benefits Review Board determined that *Halon v. Director, OWCP*, 713 F.2d 21 (3d Cir. 1983), a case in which the Third Circuit interpreted the "not . . . more restrictive" language of 30 U.S.C. § 902(f)(2) as entitling a claimant to application of the Part B (HEW) rules in a claim disposed of by the Department of Labor, only applied to claims in the Third Circuit and in other circuits having adopted this standard.

Taylor appealed to this court. We affirmed the decision of the Benefits Review Board in our opinion in *Taylor I*. There, we determined that this case was controlled by our then-recent decision in *Strike v. Director, OWCP*, 817 F.2d 395 (7th Cir. 1987). In *Strike*, we held that in enacting 30 U.S.C. § 902(f)(2), Congress only intended to prohibit the Secretary of Labor from applying more restrictive *medical* criteria in reviewing claims pursuant to 30 U.S.C. § 945. Thus, in *Taylor I*, we interpreted *Strike* as "reject[ing] the argument that Congress intended 20 C.F.R. § 410.490 [the Part B rules] to be applied to Part C claims when it 'liberalized' the Black Lung Benefits Act." *Taylor I*, 838 F.2d at 229.

Taylor filed a petition for certiorari to the Supreme Court. This petition was held in abeyance because of the Supreme Court's pending decision in *Pittston Coal Group*. On December 6, 1988, the Supreme Court decided *Pittston Coal Group*. In that case, the Supreme Court held that the interim Labor rules violated the prohibition in 30 U.S.C. § 902(f)(2) against the Secretary of Labor's employing "[c]riteria . . . not . . . more restrictive than the criteria applicable to a claim filed on June 30, 1973." The Supreme Court determined that the word "criteria" did not refer solely to medical criteria. 109 S. Ct. at 419-23. It also considered, but left open, the question whether § 902(f)(2) applied solely to total disability criteria. *Id.* at 420.

The decision in *Pittston Coal Group*, however, only discussed, and refuted, the validity of the Labor *invocation* rules.

In oral argument before the Supreme Court, the respondents in that case conceded the validity of the Labor *rebuttal rules*, "even though [these rules] permit rebuttal of more elements of statutory entitlement than did the interim HEW regulation." *Id.* at 423. Thus, the Supreme Court did not have to decide the question of the validity of the Labor rebuttal rules under § 902(f)(2), nor did it have to consider the due process arguments raised by the petitioners. *Id.*

On January 11, 1989, the Supreme Court vacated our decision in *Taylor I*, and remanded this case to us for further consideration in light of its decision in *Pittston Coal Group*. Because the ALJ's decision and order determined that Peabody successfully rebutted the presumption under the interim Labor rebuttal rules, we are presented squarely with the issue whether these rules violate 30 U.S.C. § 902(f)(2).

II. Discussion

A. Statutory Language

The criteria under the interim Labor rules for determining whether the presumption has been rebutted differ from the rebuttal criteria in the HEW rules in one important respect. The HEW rules provide that the presumption can be rebutted by a showing that the miner was working or could work at his former coal mine employment or the equivalent. 20 C.F.R. § 410.490(c)(1), (2). In *Cook v. Director, OWCP*, 816 F.2d 1182, 1185 (7th Cir. 1987), we observed in another context that "the [HEW] presumption cannot be rebutted by medical evidence." On the other hand, the interim Labor rebuttal rules provide that "all relevant medical evidence shall be considered." 20 C.F.R. § 727.203(b). Once invoked, moreover, the presumption can be rebutted not only on the grounds listed in the HEW regulation, but also on the basis that "the total disability or death of the miner did not arise in whole or in part out of coal mine employment" or that "the miner does not, or did not, have pneumoconiosis." 20 C.F.R. §§ 727.203(b)(1)-(4); *Pittston Coal Group*, 109 S. Ct. at 419.

Although *Pittston Coal Group* did not address, and indeed declined to consider, the validity of the Labor rebuttal rules, we believe that the Supreme Court's decision leaves no room for distinguishing the Labor rebuttal rules from the Labor invocation rules. Because the Labor rebuttal rules allow the consideration of medical evidence on rebuttal, while the HEW rebuttal rules do not, the former clearly are more restrictive than the latter. We note that this is so even if we were to read the term "criteria" as being limited solely to medical criteria, the interpretation of the statute specifically rejected by the Supreme Court in *Pittston Coal Group.*[3]

We respectfully disagree, therefore, with our colleagues in the Sixth Circuit that a valid distinction can be made between the Labor invocation and rebuttal rules regarding the application of § 902(f)(2). *See, e.g., Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 202 (6th Cir. 1989); *Kyle v. Director, OWCP*, 819 F.2d 139, 144 (6th Cir. 1987), *cert. denied*, ___ U.S. ___, 109 S. Ct. 566, 102 L. Ed. 2d 591 (1988); *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485,

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[3] The result would be the same even if we were to read 30 U.S.C. § 902(f)(2) as being limited to total disability criteria. This is a reading of the statute which, the Supreme Court noted, "has considerable merit, though it is by no means free from doubt," *Pittston Coal Group*, 109 S. Ct. at 420. Total disability is defined as the inability of the claimant to perform his usual coal mine employment or the equivalent. *Id.* As the Court also noted, "The various criteria that go into determining a claim of entitlement under the interim HEW regulation are closely—indeed, inextricably—intertwined," *id.* at 421 (noting that claimants who do not meet the ten-year requirement under the interim Labor invocation rules must submit affirmative proof of total disability, which would involve principally medical proof of disability). Likewise, with regard to the rebuttal rules, it appears that evidence of total disability that could not come in under the HEW scheme could come in under the Labor scheme. This is what occurred in this case. The ALJ concluded that Peabody Coal had rebutted the presumption under 20 C.F.R. § 727.203(b)(2), determining that Taylor could perform his usual coal mine employment. He also concluded, however, that Peabody Coal had not rebutted the presumption under the HEW rebuttal rules, which contain a provision identical to § 727.203(b)(2).

489 (6th Cir. 1985). In *Youghiogheny*, which was decided after *Pittston Coal Group*, the Sixth Circuit distinguished the Labor rebuttal rules from the Labor invocation rules based upon its prior precedent, which made such a distinction.

We believe that the Supreme Court's decision in *Pittston Coal Group* forecloses the distinction the Sixth Circuit makes for the reasons it gives. *Compare Youghiogheny*, 866 F.2d at 199 n.1 ("[T]he *Pittston* opinion sheds no light on the issue before us today"). The Sixth Circuit distinguishes the invocation rules from the rebuttal rules based upon the following legislative history:

> The conferees intend that the Secretary of Labor shall promulgate regulations for the determination of total disability or death due to pneumoconiosis. With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973, *except that in determining claims under such criteria all relevant medical evidence shall be considered* in accordance with standards prescribed by the Secretary of Labor and published in the Federal Register.

H.R. Rep. No. 864, 95th Cong., 2d Sess., *reprinted* in 1978 U.S. Code Cong. & Admin. News 237, 308-09 (emphasis supplied).[4] The Sixth Circuit has interpreted this legislative history to mean that "the conferees intended to establish a medical test for rebuttal by showing the claimant was able to do his usual coal mine work." *Ramey*, 755 F.2d at 489-90. It

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[4] By way of explanation, the House version of the Black Lung Benefits Reform Act of 1977 would have applied the HEW rules to both Part B and Part C claims. The Senate version of the bill, however, authorized the Secretary of Labor to draft his own medical eligibility criteria to be used in adjudicating Part C claims. The Conference Committee, which adopted the Senate bill with several provisos, made the above observations. *Ramey*, 755 F.2d at 489.

has distinguished application of the "not more . . . restrictive . . . criteria" language in 30 U.S.C. § 902(f)(2) to the invocation rules but not to the rebuttal rules on the ground that Congress did not intend this language to require application of the same evidentiary rules to Part B and Part C cases, but rather intended for these rules to change over time. *Kyle*, 819 F.2d at 144; *Ramey*, 755 F.2d at 490.

We disagree with this rationale for several reasons. First, the Court in *Pittston Coal Group* determined that the text of § 902(f)(2) "plainly embraces criteria of more general application" than medical criteria. 109 S. Ct. at 420-21. This includes evidentiary rules and adjudicatory standards, whether they be applied on invocation or on rebuttal. *See Halon*, 713 F.2d at 24 (legislative history of the Black Lung Benefits Reform Act suggests that "criteria" referred to both adjudicatory and medical standards); *but see Pittston Coal Group*, 109 S. Ct. at 430-37 (Stevens, J., dissenting) (argues that Congress in fact meant to distinguish between medical criteria and evidentiary rules). Even if the text conflicts with the legislative history of the statute, moreover, "[i]t is not the law that a statute can have no effects which are not explicitly mentioned in its legislative history," *Pittston Coal Group*, 109 S. Ct. at 420-21; *accord Belisle v. Plunkett*, No. 88-3189, slip op. at 8 (7th Cir. June 6, 1989). Thus, we conclude that the Labor rebuttal rules violate 30 U.S.C. § 902(f)(2).

B. Due Process

Because we have determined that the Labor rebuttal rules violate the prohibition in 30 U.S.C. § 902(f)(2) against "not more . . . restrictive . . . criteria," we must address Peabody Coal's due process challenge. Unlike the majority of due process arguments advanced in this area, which have been in the vein that the applicable statutes and/or regulations regulate too much, Peabody Coal argues here that with respect to private parties, the HEW invocation and rebuttal rules regulate too little. With respect to the invocation rules,

Peabody Coal contends that they violate due process because they do not provide any minimum period of coal mine employment to invoke the presumption. It claims that those cases that have upheld the Labor rules on due process grounds have relied heavily on the requirement of ten years of employment to invoke the presumption. With respect to the HEW rebuttal rules, Peabody Coal seems to argue that application of these rules violates due process because other legitimate means of rebutting the presumption (to wit, those means embodied in 20 C.F.R. §§ 727.203(b)(3), (b)(4)) exist, yet they are unavailable to responsible operators.[5]

This is not the proper case to address Peabody Coal's first argument.[6] Even if we were to decide that due process requires a ten-year minimum period of coal mine employment, Taylor, who worked as a coal miner for approximately forty-two years, has satisfied this condition. Hence, it is not necessary for us to consider here whether there should be such a requirement. *Cf. Kaiser Steel Corp. v. Director, OWCP*, 748 F.2d 1426, 1431 (10th Cir. 1984) (court of appeals declined to consider constitutional attack on the validity of two of the four parts of the Labor invocation regulation because in that case, even were they to strike down those two parts, disability still would be presumed under the remaining two parts). In general, courts will not consider constitutional arguments where a case may be disposed of on alternate, nonconstitutional grounds. *Jean v. Nelson*, 472 U.S. 846, 854-55, 105 S. Ct. 2992, 2997, 86 L. Ed. 2d 664 (1985); *United States v. Sec. Indus. Bank*, 459 U.S. 70, 78, 103 S. Ct. 407, 412-13, 74 L. Ed. 2d 235 (1982); *Hagans v. Lavine*, 415 U.S. 528, 546-47 & n.12, 94 S. Ct. 1372, 1383-84 & n.12, 39 L. Ed. 2d 577 (1974); *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288,

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[5] Sections 727.203(b)(1), (2) of Title 20 of the Code of Federal Regulations parallel 20 C.F.R. §§ 410.490(c)(1), (2).

[6] Peabody Coal argues that allowing the presumption to be invoked on the basis of x-ray evidence alone flunks the "rational connection" test used by the Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 28, 96 S. Ct. 2882, 2898, 49 L. Ed. 2d 752 (1976).

347, 56 S. Ct. 466, 483, 80 L. Ed. 688 (1936) (Brandeis, J., concurring).

Peabody Coal's second argument, with respect to the rebuttal rules, is without merit. What it essentially argues (in light of our holding above with respect to § 902(f)(2)'s restriction on the rebuttal rules) is that it has been deprived of due process because Congress could have made available more factors under which the presumption could be rebutted, yet it did not do so. We rejected a similar argument in *Battaglia v. Peabody Coal Co.*, 690 F.2d 106, 112-13 (7th Cir. 1982). In holding that 30 U.S.C. § 921(c)(5) did not violate the due process clause because it did not distinguish between surface and underground miners, we relied in part on the Supreme Court's words in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S. Ct. 2882, 49 L. Ed. 2d 752 (1976) where it said:

> In its "rough accommodations," . . . Congress was surely entitled to select duration of employment, to the exclusion of the degree of dust exposure and other relevant factors, as signaling the point at which the operator must come forward with evidence of the cause of pneumoconiosis or death, as the case may be. We certainly cannot say that the presumptions, by excluding other relevant factors, operate in a "purely arbitrary" manner.

428 U.S. at 29-30, 96 S. Ct. at 2899 (citations omitted). Likewise, we do not think that 30 U.S.C. § 902(f)(2), in forbidding consideration of certain criteria on rebuttal, operates in a "purely arbitrary" manner.

III. Conclusion

The Supreme Court's opinion in *Pittston Coal Group* indicates that we must apply the HEW invocation rules to this Part C case. We have concluded that *Pittston Coal Group's* reasoning requires us to apply the HEW rebuttal rules as well. The ALJ determined, as discussed above, that Taylor

successfully invoked the presumption under the HEW rules and that Peabody Coal failed to rebut it. Therefore, we REVERSE the determination of the Benefits Review Board and reinstate the ALJ'S award of benefits to Hubert C. Taylor.

A true Copy:

Teste:

Clerk of the United States
Court of Appeals for the
Seventh Circuit

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JANUARY 30, 1989.

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

HUBERT C. TAYLOR, *Petitioner,* No. 86-2590 *vs.* PEABODY COAL COMPANY, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Respondents.*	Petition for Review of an Order of the Benefits Review Board.

This matter comes before the court for its consideration of the following documents:

1. "MOTION TO SCHEDULE CASE FOR BRIEFING AND ORAL ARGUMENT FOLLOWING SUPREME COURT REMAND" filed herein on January 17, 1989 by counsel for the respondents.

2. "PETITIONER'S POSITION FOLLOWING SUPREME COURT REMAND AND RESPONSE TO THE DIRECTOR'S MOTION AND PEABODY'S REQUEST TO SCHEDULE CASE FOR BRIEFING AND ORAL ARGUMENT" filed herejn on January 23, 1989.

On consideration thereof,

IT IS ORDERED that the "MOTION TO SCHEDULE CASE FOR BRIEFING AND ORAL ARGUMENT FOLLOWING SUPREME COURT REMAND" is DENIED.

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

JANUARY 25, 1988.

Before

Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

HUBERT C. TAYLOR, *Petitioner,*	
No. 86-2590	
vs.	Petition for Review of an Order of the Benefits Review Board
PEABODY COAL COMPANY, AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, *Respondents.*	

This cause was heard on the record from the Benefits Review Board, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the petition seeking review of the Board's decision is DENIED, with costs, in accordance with the opinion of this Court filed this date.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 86-2590

HUBERT C. TAYLOR,

Petitioner,

v.

PEABODY COAL COMPANY AND DIRECTOR, OFFICE OF WORKERS' COMPENSATION,

Respondents.

ARGUED OCT. 28, 1987.
DECIDED JAN. 25, 1988.

JACK N. VANSTONE, VANSTONE & KROCHTA, EVANSVILLE, IND.,

for petitioner.

W.C. BLANTON, ICE, MILLER, DONADIO & RYAN, INDIANAPOLIS, IND.,

for respondents.

Before

EASTERBROOK, RIPPLE, and KANNE,

Circuit Judges.

KANNE,

Circuit Judge.

Petitioner is Hubert C. Taylor, ("Taylor"), a retired miner. Respondent is Peabody Coal Co., ("Peabody"), his former employer. This appeal concerns Taylor's 1978 claim for benefits under the Black Lung Benefits Act, 30 U.S.C.

§§ 901-945. We have jurisdiction pursuant to § 21(c) of the Longshoreman's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 921(c), as incorporated by § 422(a) of the Black Lung Benefits Act, 30 U.S.C. § 932(a). Congress divided black lung benefits claims into two separately administered programs, one formerly regulated by the Secretary of Health, Education and Welfare under 20 C.F.R. § 410.490 (Part B) and another regulated by the Secretary of Labor under 20 C.F.R. § 727.203 (Part C). Claims filed before December 31, 1973 are resolved under Part B's provisions and those filed after that date are administered under Part C's provisions. We agree with the analysis of the Benefits Review Board, which found that because Taylor's claim was filed after the December 31, 1973 cut-off date, it must be resolved under the Part C provisions found at 20 C.F.R. § 727.203. We therefore deny Taylor's petition for review.

The Office of Workers' Compensation Programs approved Hubert Taylor's application for benefits on March 31, 1981. Peabody filed a Notice of Controversion on April 8, 1980 and requested a formal hearing.

The Administrative Law Judge ("ALJ") held a hearing on December 4, 1984. Because Taylor's claim was filed after the deadline for Part B claims, the ALJ initially applied Part C regulations promulgated by the Secretary of Labor. The ALJ found that Taylor met his initial burden under 20 C.F.R. § 727.203 by establishing a rebuttable presumption that he was entitled to benefits. The ALJ concluded, however, that Peabody successfully rebutted the interim presumption pursuant to 20 C.F.R. § 727.203(b)(2) by presenting medical evidence that Taylor had only a mild pulmonary impairment which did not prohibit him from performing his work.

Taylor argued that Congress intended to liberalize eligibility for black lung benefits. The ALJ next examined Taylor's claim under the Part B regulations. He found that Taylor was entitled to benefits and that Peabody failed to rebut the presumption that Taylor should receive black lung benefits.

Peabody then appealed the ALJ's decision to the Benefits Review Board ("Board"). The Board reversed the ALJ's application of Part B regulations and held that claims for black lung benefits filed after December 31, 1973 must be resolved through an exclusive application of Part C regulations.

Petitioner argues that in amending the Black Lung Benefits Act, Congress intended to liberalize the eligibility requirements. Title 30 U.S.C. § 902(f)(2)(C) mandates that "[r]egulations promulgated under this subsection by the Secretary of Labor; *shall not be more restrictive* than the criteria applicable to a claim filed on June 30, 1973. . . . (Part B)." Taylor interprets the "not more restrictive" language of the statute as a direction to consider his claim under the more "liberal" criteria of Part B. Petitioner contends that this interpretation is more consistent with the policy of liberalization underlying the amended Black Lung Benefits Act. In his initial brief, petitioner cites *Halon v. Office of Workers' Compensation Programs*, 713 F.2d 21 (3rd Cir. 1982) in which a claim for black lung benefits was filed after the 1973 deadline and disposed of by the Department of Labor. In *Halon*, the Third Circuit interpreted the "not more restrictive" language of 30 U.S.C. § 902(f)(2) as entitling the claimant to the benefit of disposition under Part B.

The *Halon* court wrote:

> We agree . . . that if the Board is to effectuate the intent of Congress in enacting the 1977 Amendments to the Black Lung Benefits Act, of which 30 U.S.C. § 902(f)(2) is a part, it must apply the presumption in C.F.R. § 410.490(b) whenever the claimant establishes pneumoconiosis by x-ray, biopsy or autopsy, and also establishes that the pneumoconiosis arose out of coal mine employment.

Halon, 713 F.2d at 31. Other circuits are in accord. *Coughlan v. Director, OWCP*, 757 F.2d 966, 968 (8th Cir. 1985); *Kyle v. Director, OWCP*, 819 F.2d 139, 143 (6th Cir. 1987); *Broyles v. Director, OWCP*, 824 F.2d 327 (4th Cir. 1987); *In re Sebben*, 815 F.2d 475 (8th Cir. 1987) (*petition for cert. filed*).

However, we do not agree with this interpretation. In *Strike v. Director*, 817 F.2d 395 (7th Cir. 1987), as in the case at bar, the claimant sought consideration under the Part B regulations of 20 C.F.R. § 410.490 because the criteria for the Part C regulations under 20 C.F.R. § 727.203 were "more restrictive."

We reviewed the legislative history of the term "criteria," and held that:

> [W]e are nonetheless convinced that the statute and the relevant legislative history do make clear that in enacting § 902(f)(2), *Congress only intended to prohibit the Secretary of Labor from applying more restrictive medical criteria* in reviewing previously denied and pending claims pursuant to § 945.

Strike, 817 F.2d at 404. (Emphasis added.)

Thus, this circuit has rejected the argument that Congress intended § 410.490 to be applied to Part C claims when it "liberalized" the Black Lung Benefits Act.

Petitioner, in his initial brief, said the case is like *Halon*. In his reply brief (after *Strike*) he distinguishes this case from *Halon*. Petitioner cannot have it both ways. It is well settled that issues appearing for the first time in a reply brief will not be considered by this court. *See* Rule 9(c) of the Rules of the United States Court of Appeals for the Seventh Circuit; *Matter of Bear*, 789 F.2d 577, 579 (7th Cir. 1986); *Christmas v. Sanders*, 759 F.2d 1284, 1292 (7th Cir. 1985); *Beerly v. Department of Treasury*, 768 F.2d 942, 949 (7th Cir. 1985).

Because we adhere to our holding in *Strike* that "[t]he Part B and Part C programs were intended to be separate and

distinct," *Id.* p. 405, we find that the Board correctly resolved Taylor's claim by exclusively applying the Part C regulations. Taylor did not establish eligibility for black lung benefits under Part C, and the ALJ cannot refer to the procedural provisions of Part B. Thus, Taylor's petition seeking review of the Board's decision is DENIED.

United States Supreme Court

MEMORANDUM DECISION

HUBERT C. TAYLOR,

petitioner,

v.

PEABODY COAL COMPANY, et al.

No. 87-1720

Case below, 838 F.2d 227.

Dec. 12, 1988. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Seventh Circuit for further consideration in light of *Pittston Coal Group v. Sebben*, 488 U.S. ___, 109 S. Ct. 414, ___L. Ed. 2d ___ (1988).

Justice BRENNAN took no part in the consideration or decision of this case.

U.S. Department of Labor

Benefits Review Board
1111 20th Street, N.W.
Washington, D.C. 20036
BRB No. 85-2177 BLA
OWCP No. 310-10-4934

HUBERT C. TAYLOR
Claimant-Respondent

v.

PEABODY COAL COMPANY
Employer-Petitioner

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR
Party-in-Interest

DECISION AND ORDER

NOT PUBLISHED
July 29, 1986

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Jack N. VanStone (VanStone and Krochta), Evansville, Indiana, for claimant.

David J. Mallon, Jr. (Ice, Miller, Donadio and Ryan), Indianapolis, Indiana, for employer.

Michael J. Denney (Donald S. Shire, Associate Solicitor of Labor; Rae Ellen Frank James, Counsel for Benefit Programs), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BROWN and DOLDER, Administrative Appeals Judges, and CLARKE, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order (82-BLA-3822) of Administrative Law Judge Robert L. Hillyard awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* The administrative law judge found the evidence sufficient to invoke the interim presumption under 20 C.F.R. § 727.203(a)(1) and to establish rebuttal under 20 C.F.R. § 727.203(b)(2). The administrative law judge concluded that the Section 727.203(b)(2) rebuttal finding precluded a finding of entitlement under the permanent criteria of 20 C.F.R. Part 410, Subpart D. Upon application of the interim criteria of Part 410 to the facts of this case, however, the administrative law judge determined that claimant had established invocation of the Section 410.490 presumption. *See Halon v. Director, OWCP*, 713 F.2d 30, 5 BLR 2-20 (3d. Cir. 1982), *aff'd on rehearing*, 713 F.2d 21 (1983); 20 C.F.R. § 410.490(b). Notwithstanding his finding of rebuttal pursuant to Section 727.203(b)(2), the administrative law judge found that rebuttal of the Section 410.490 presumption had not been established under *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 5 BLR 2-30 (6th Cir. 1983). *See* 20 C.F.R. § 410.490(c). Employer assigns error to the administrative law judge's application of the provisions of Section 410.490 against an employer and carrier in a case arising in the Seventh Circuit, Employer's brief at 4-5, 6-9, Employer's reply brief at 1-3, and to the administrative law judge's application of the vocational disability rule set forth in *Haywood, supra* to this Part C claim. Employer's brief at 3-4; *see Ramey v. Kentland Elkhorn Coal*

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* Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C.A. § 921(b)(5) (West 1986).

Corp., 755 F.2d 485, 490 (6th Cir. 1985). Employer additionally contends that the administrative law judge's assessment of interest against employer commencing with the putative month of entitlement, *i.e.*, June 1977, constitutes error. Employer's brief at 5-6.

The Board's scope of review is governed by statute. If the administrative law judge's findings of fact are supported by substantial evidence, are rational, and are in accordance with law, they are binding upon the Board and may not be disturbed. 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer's challenge to the administrative law judge's award of benefits on the basis of *Halon, supra*, 713 F.2d 30, 5 BLR 2-20 (3d. Cir. 1982), *Coughlan v. Director, OWCP*, 757 F.2d 966, 7 BLR 2-177 (8th Cir. 1985), and the presumption found at Section 410.490, is dispositive of this appeal. The Board has held that the *Halon* holding will be followed only in the Third Circuit and in other circuits having adopted *Halon, viz.*, the Eighth Circuit. *See Stanton v. Director, OWCP*, 8 BLR 1-438 (1986); *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985); *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The instant case arises in The Seventh Circuit.[1] *See Hon v. Director, OWCP*, 699 F.2d 441, 444 (8th Cir. 1983); *Tobin v. Director, OWCP*, 8 BLR 1-115, 1-118 n. 2 (1985). We therefore

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[1] The administrative law judge erroneously assumed that this case is governed by the law of the United States Court of Appeals for the Sixth Circuit. *See* Decision and Order at 11 n. 3. Although neither the hearing transcript nor the documentary evidence of record clearly identifies the state in which claimant's coal mine employment occurred, the record indicates that the hearing was convened in claimant's home state of Indiana, counsel for claimant and employer practice in Indiana, claimant was married in Indiana (Director's Exhibit 4), and claimant obtained medical treatment in Indiana. Consequently, we hold, as urged by employer and the Director (*see* Employer's brief at 4; Director's brief at 3) that the present case arises in the Seventh Circuit.

reverse the administrative law judge's award of benefits since it was predicated on the erroneous application of *Halon, supra*, and the Section 410.490 presumption. Because we reverse the award, we need not reach employer's arguments concerning the invalidity of Section 410.490 as applied to an employer and carrier, the inapplicability of the *Haywood* vocational disability rule, or the assessment of interest. Finally, we affirm the administrative law judge's finding of rebuttal under Section 727.203(b)(2) since this determination was not challenged on appeal.

Accordingly, the Decision and Order awarding benefits is reversed.

SO ORDERED.

/s/ James F. Brown

JAMES F. BROWN
Administrative Law Judge

/s/ Nancy S. Dolder

NANCY S. DOLDER
Administrative Appeals Judge

/s/ David A. Clarke, Jr.

DAVID A. CLARKE, JR.
Administrative Law Judge

Dated this 29th day
of July 1986

U.S. Department Of Labor

Office of Administrative Law Judges
304A U.S. Post Office and Courthouse
Cincinnati, Ohio 45202
(513) 684-3252

In the Matter of
HUBERT C. TAYLOR
Claimant
v.
PEABODY COAL COMPANY
Employer
and
OLD REPUBLIC INSURANCE COMPANY
Carrier
and
DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Date Issued: Aug. 29, 1985
Case No. 82-BLA-3822
OWCP No. CO 310-10-4934 LM
Not-Published

APPEARANCES:[1]
JACK N. VANSTONE, ESQ.
For the Claimant
JACQUELINE A. SIMMONS, ESQ.
For the Employer/Carrier
BEFORE:
ROBERT L. HILLYARD
Administrative Law Judge

[1] The Director, Office of Workers' Compensation Programs, was not represented by counsel at the hearing.

DECISION AND ORDER—AWARD OF BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. Section 901 *et seq.* In accordance with the Act, and the Regulations issued thereunder, this case was referred to the Office of Administrative Law Judges by the Director, Office of Workers' Compensation Programs, for a formal hearing.

Benefits under the Act are awardable to persons who are totally disabled within the meaning of the Act due to pneumoconiosis or to the survivors of persons who were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a dust disease of the lungs arising from coal mine employment and is commonly known as black lung.

A formal hearing in this case was held in Evansville, Indiana, on December 4, 1984. Each of the parties was afforded full opportunity to present evidence and argument at the hearing as provided in the Act and the Regulations issued thereunder which are found in Title 20 of the Code of Federal Regulations. Regulation section numbers mentioned in this Decision and Order refer to sections of that title.

The findings and conclusions which follow are based upon my observation of the appearance and the demeanor of the witnesses who testified at the hearing, and upon a careful analysis of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent case law.

I. STATEMENT OF THE CASE

The Claimant, Hubert C. Taylor, on June 6, 1977, filed a claim for benefits under the Federal Coal Mine Health and

Safety Act of 1969, as amended (DX 1).[2] His claim was approved by the Office of Workers' Compensation Programs on March 31, 1980 (DX 15). Peabody Coal Company was identified as the responsible operator and filed its notice of controversion on April 8, 1980 (DX 13-16). A formal hearing was requested and the case was referred to the Office of Administrative Law Judges on December 18, 1981 (DX 23).

II. ISSUES

The specific issues presented for resolution are:

1. Whether the miner has pneumoconiosis as defined by the Act and the regulations;

2. Whether the miner's pneumoconiosis arose out of coal mine employment;

3. Whether the miner is totally disabled; and

4. Whether the miner's disability is due to pneumoconiosis.

An Administrative Law Judge is precluded from ruling on the constitutionality of the Act and regulations he is called upon to interpret. Therefore, this issue will not be addressed (DX 23; Tr. 12).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Claimant's Background

1. The Claimant, Hubert C. Taylor, was born on April 8, 1915 and was 69 years of age at the time of the hearing. He has a fifth grade education (DX 1).

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[2] "DX" refers to the Director's exhibits, "CX" refers to the Claimant's exhibits, "EX" refers to the Employer's exhibits, and "Tr." refers to the transcript of the hearing.

2. The Claimant has one dependent for purposes of augmentation of benefits, his wife, Ida Mae Taylor, whom he married on October 4, 1941 (DX 4; Tr. 14).

B. Coal Mine Employment

Length of coal mine employment is not a contested issue in this case. On his application for benefits, the Claimant alleged 42 years of coal mine employment ending in November, 1976 (DX 1). The personnel records of Peabody Coal Company show that the Claimant was employed by Peabody Coal or its predecessor companies from May, 1934, and was still active through March 24, 1976 (DX 3). The last job which the Claimant performed over a substantial period of time was as a ramp operator (Tr. 14). Therefore, I find that the Claimant has established 42 years of coal mine employment ending in 1976.

IV. MEDICAL EVIDENCE

A. X-ray Studies

	Date	Exhibit	Doctor	Reading	Standards
1.	7-9-84	CX 2	Baker Bd. Cert. Rad.	1/2 q	Acceptable
2.	7-9-84 (reread)	EX 6	McGraw B reader; Bd. Cert. Rad.	1/0 s	Acceptable
3.	7-9-84 (reread)	EX 8	Bridges B reader; Bd. Cert. Rad.	1/0 s/t	Acceptable
4.	7-9-84 (reread)	EX 8	Renn B reader	No pneumoconiosis	Acceptable
5.	7-5-84 (reread)	EX 6	McGraw B reader; Bd. Cert. Rad.	1/0 s	Acceptable
6.	7-5-84 (reread)	EX 8	Bridges B reader; Bd. Cert. Rad.	1/0 s/t	Acceptable
7.	7-5-84 (reread)	EX 8	Renn B reader;	1/0 s/t	Acceptable
8.	12-19-79	DX 10, DX 11	Noveroske Bd. Cert. Rad.	Completely negative	Not noted

	Date	Exhibit	Doctor	Reading	Standards
9.	12-19-79 (reread)	DX 9	Greene B reader	1/0 t	Acceptable
10.	12-19-79 (reread)	EX 4	McGraw B reader; Bd. Cert. Rad.	1/0 s/s	Acceptable
11.	12-19-79 (reread)	EX 8	Bridges B reader; Bd. Cert. Rad.	1/0 s/t	Acceptable
12.	12-19-79 (reread)	EX 8	Renn B reader	No pneumoconiosis	Acceptable
13.	12-10-79 (reread)	DX 18	Beeler Bd. Cert. Rad.	1/1 s	Not noted
14.	12-15-76	DX 19	Harmon	Normal chest (not read for pneumoconiosis)	Not noted
15.	12-1-76	EX 3	Hendershot	Essentially normal chest	Not noted
16.	9-1-70	DX 19	Cook	Mild aortic arteriosclerosis; pleural scarring	Not noted
17.	9-6-67	DX 19	Hovda	Normal chest (not read for pneumoconiosis)	Not noted

B. Pulmonary Function Studies

	Date	Exhibit	Doctor	Height	FEV_1	MVV	Standards
1.	7-5-84	CX 2, CX 3	Houser	71"	2.49	73.3	Comprehension & cooperation not noted; 3 tracings

Comment: Mild reduction in forced vital capacity with no evidence of airway obstruction; moderate reduction in MVV noted.

Note: Dr. James Vest found this pulmonary function study invalid for accurate interpretation due to suboptimal patient effort (EX 8).

Note: Dr. Peter Tuteur found the forced expiratory maneuvers and MVV maneuvers invalid for interpretation of maximum pulmonary function and stated that the absolutely normal FEV_1 and FVC suggested the absence of a significant ventilatory defect (Ex 8).

	Date	Exhibit	Doctor	Height	FEV_1	MVV	Standards
2.	12-19-79	DX 6	Ali	71″	1.98	70	Good comprehension & cooperation; 3 tracings

In a validation study, Dr. Long found vents unacceptable because of poor effort, especially on FEV_1 (DX 6).

In a validation study, Dr. J. Vest found vents unacceptable due to suboptimal patient effort (EX 1).

	Date	Exhibit	Doctor	Height	FEV_1	MVV	Standards
3.	11-29-76	EX 3	Korn	71″	2.67	35	Some difficulty following instructions; no tracings

C. Blood Gas Studies

	Date	Exhibit	pCO_2	pO_2
1.	7-5-84	CX 2	35.0	100.3
2.	12-19-79	DX 6, DX 8	23.1	63.4

Comment: These functions are consistent with a severe restrictive ventilatory defect. There is no evidence of obstruction. Blood gases indicate hypoxemia with hyperventilation.

Note: In a validation study, Dr. Long found these results unacceptable and not feasible, due to probable mechanical or technical error (DX 6).

Note: Dr. Vest doubted the validity of these results due to the low pCO_2 and the normal pH (EX 2).

D. Narrative Medical Evidence

1. Dr. Syed A. Ali examined the Claimant on December 28, 1979, at which time he reviewed the Claimant's symptoms and his occupational (coal mine employment from 1934 to 1977), medical, smoking (one and one-half packs of cigarettes per day for 32 years, stopped on June 14, 1975), and family histories, and performed a physical examination, pulmonary function study, blood gas study and x-ray. He diagnosed (1) Restrictive lung disease without obstructive component; (2) Obesity; and (3) Arthritis, left knee,

status post op. In his opinion, some of the Claimant's disability could be attributed to obesity and some to arthritis of the left knee, and he stated that exposure to dust in coal mines did not seem to be a major factor. Dr. Ali also stated that the Claimant stopped coughing when he quit smoking on June 14, 1975 (DX 7).

Dr. Ali stated in a deposition taken on January 30, 1985, that he examined the Claimant on December 28, 1979. He reviewed the medical report that he prepared at that time, and stated that he also saw the Claimant six times after the initial examination for his heart and knee problems. Dr. Ali stated that, in his opinion, the Claimant was not severely disabled, but what disability he did have was caused by a combination of factors. Dr. Ali believed that obesity was the major cause of his disability, but also thought that cigarette smoking, 42 years of coal mine employment, and the Claimant's knee condition also contributed to his disability. Dr. Ali also noted that the Claimant suffered from congestive heart failure due to arteriosclerotic heart disease (EX 7).

2. Dr. David W. Howard testified in a deposition taken on January 11, 1985, that he reviewed the Claimant's hospital record, x-rays, pulmonary function studies, blood gas studies, the report of Dr. Ali and the telephonic deposition of the Claimant taken on November 22, 1984, concerning his coal mine employment. He stated that he disagreed with Dr. Ali's finding of a restrictive disease and believed that the pulmonary function study of December 19, 1979 showed a moderate obstructive pulmonary impairment rather than a restrictive impairment because a restrictive impairment could not be diagnosed without other studies. Dr. Howard concluded that the Claimant had simple pneumoconiosis, very mild impairment, and stated that his heart disease and obesity could contribute to this impairment. After reviewing the Claimant's description of his job as a ramp operator, Dr. Howard stated that the Claimant could perform this job from a pulmonary standpoint (EX 5).

3. Records from St. Mary's Hospital in Evansville, Indiana, show that the Claimant was admitted on September 9, 1967 and discharged on September 12, 1967 with a final diagnosis of

macrofollicular adenoma of thyroid. A subtotal thyroidectomy was performed (DX 19).

Records show that the Claimant was admitted to St. Mary's Hospital on August 31, 1970 and discharged on September 8, 1970 with a final diagnosis of Arteriosclerotic cardiovascular disease; Peripheral arteriosclerosis; Phlebothrombosis, right leg; Pulmonary emphysema (DX 19).

The Claimant was admitted to St. Mary's on December 6, 1976 with severe osteoarthritic change of the left knee for total knee arthroplasty. Dr. Korn reported that several medical problems prompted surgical admission for treatment of organic heart disease with significant right and left sided congestive heart failure. He performed a physical examination and EKG, and stated that a left total knee arthroplasty was performed by Dr. A. Percinel. He also noted a 54 pack-year smoking history, none in the last year. Dr. Korn diagnosed (1) Destructive arthritis of the left knee; (2) History of syphilis with positive FTA-ABS; (3) Exogenous obesity; (4) Organic heart disease; and (5) Hyperuricemia. A left total knee replacement was performed (DX 19).

4. Dr. A. K. Percinel stated in a letter dated November 24, 1980, that he first saw the Claimant on November 17, 1976 and treated him for degenerative arthritis of his left knee. He did not evaluate him for black lung (DX 18).

V. DISCUSSION AND APPLICABLE LAW

Since the Claimant has established more than ten years of coal mine employment, he will be entitled to a rebuttable presumption of total disability due to pneumoconiosis provided one of the four conditions in §727.203(a) is met.

Under §727.203(a)(1), the presumption will be invoked by autopsy, biopsy or x-ray evidence establishing the existence of pneumoconiosis. In this case, there is no autopsy or biopsy evidence. The record contains 17 readings of seven separate x-rays. The x-ray of July 9, 1984 was read as positive for pneumoconiosis by Dr. Baker, a board certified radiologist, and by Drs. McGraw

and Bridges, who are both B readers and board certified radiologists, and was read as negative for pneumoconiosis by Dr. Renn, also a B reader and board certified radiologist. The x-rays of July 5, 1984 and December 19, 1979 were read as positive for pneumoconiosis by Drs. McGraw, Greene (a B reader), and Bridges, and were read as negative by Dr. Renn. The x-ray of December 19, 1979 was read as negative by a board certified radiologist and the x-ray taken on December 10, 1979 was read as positive by a board certified radiologist. Two additional x-rays, taken on December 15, 1976 and September 6, 1967, were not read for pneumoconiosis, and the x-rays of December 1, 1976 and September 1, 1970 did not mention pneumoconiosis. I place greater weight on the nine positive x-ray readings because five different board certified radiologists and/or B readers found x-ray evidence of pneumoconiosis, whereas only two radiologists and/or B readers found no evidence of pneumoconiosis. Therefore, the presumption is invoked under §727.203(a)(1).

Under §727.203(a)(2), the presumption will be invoked by ventilatory studies with results equal to or less than the listed table values. In order to invoke the presumption under this section, the study must be both qualifying (equal to or below the table values) and conforming (meeting the requirements of §410.430). In this case, the pulmonary function studies of December 19, 1979 and July 5, 1984 both produced qualifying values. However, Drs. Long and Vest both found the pulmonary function study of December 19, 1979 unacceptable due to sub-optimal patient effort. Drs. Vest and Tuteur also found the pulmonary function study of July 5, 1984 invalid due to sub-optimal patient effort, and Dr. Houser, the performing physician, did not note the Claimant's cooperation or comprehension. The qualifications of Drs. Vest and Tuteur are included in the record and I find that their opinions are sufficient to discredit the pulmonary function study. Therefore, the presumption is not invoked under §727.203(a)(2).

To invoke under §727.203(a)(3), there must be blood gas studies with results equal to or less than the listed table values. In this case, the blood gas study of December 19, 1979 produced qualifying values, but Dr. Long found that these results were not

feasible and probably the result of mechanical or technical error, and Dr. Vest doubted the validity of this test due to the low pCO_2 and the normal pH. Dr. Howard stated that these blood gases could be valid, but that he would like to see a repeat test. In addition, the blood gas study of July 5, 1984 produced non-qualifying values and this study is more probative of the Claimant's current condition because it was performed four years later. Therefore, due to the questionable validity of the December 19, 1979 study and the fact that the more recent study of July 5, 1984 did not produce qualifying values, I find that the blood gas studies do not invoke the presumption under §727.203(a)(3).

Under §727.203(a)(4), the presumption will be invoked by other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment establishing the presence of a totally disabling respiratory or pulmonary impairment. In *Meadows v. Westmoreland Coal Company*, 6 BLR 1-773 (1984), the Benefits Review Board held that all medical reports must be weighed before determining whether the presumption should be invoked under §727.203(a)(4). In this case, Dr. Ali examined the Claimant, but did not express an opinion as to the Claimant's disability and Dr. Howard, who reviewed the medical evidence, stated that from a pulmonary standpoint, the Claimant would still be able to perform his usual coal mine job as a ramp operator. Therefore. since there are no medical opinions finding that the presence of a totally disabling respiratory or pulmonary impairment, the presumption is not invoked under §727.203(a)(4).

Once the presumption is invoked, the Claimant will be entitled to benefits unless the presumption is rebutted under §727.203(b). In this case, the presumption is not rebutted under §727.203(b)(1) because the evidence is clear that the miner last worked in 1976 (DX 1; Tr. 14).

To rebut under §727.203(b)(2), the Employer must present evidence that the miner either has no respiratory or pulmonary impairment or that the impairment he does have does not prevent him from performing his usual coal mine work. *Sykes v. Itmann Coal Company*, 2 BLR 1-1089 (1980). In this case, Dr. Howard

found a mild impairment, but stated that, from a pulmonary standpoint, the Claimant could perform his usual coal mine employment. Although Dr. Howard did not examine the Claimant, he based his opinion on the Claimant's histories, including a description of the Claimant's coal mine duties, and on the results of objective testing, and his opinion is uncontradicted. *Worthington v. United States Steel Corporation*, 7 BLR 1-522 (1984). Therefore, I find that the Employer has established that the Claimant's impairment does not prevent him from performing his usual coal mine employment and the presumption is rebutted under §727.203(b)(2).

Section 727.203(b)(3) provides for rebuttal of the presumption where the evidence establishes that the total disability of the miner did not arise, in whole or in part, out of coal mine employment. *Gibas v. Saginaw Mining Company*, 748 F.2d 1112, 1120 (6th Cir. 1984); *Carozza v. United States Steel Corporation*, 727 F.2d 74, 78 (3rd Cir. 1984). In this case, Dr. Ali found that the Claimant's coal mine employment contributed to his disability and Dr. Howard found a mild impairment due to his pneumoconiosis. Therefore, the presumption has not been rebutted under §727.203(b)(3).

Under §727.203(b)(4), the presumption will be rebutted if the evidence establishes that the Claimant does not have pneumoconiosis. In this case, the x-ray evidence establishes the presence of pneumoconiosis. Therefore, the presumption is not rebutted under §727.203(b)(4).

Because the Claimant has not established entitlement to benefits under §727.203, he must establish entitlement under 20 C.F.R. Part 410 to be awarded benefits. My finding that the Claimant has not established a totally disabling pulmonary or respiratory impairment precludes an award of benefits under the permanent criteria

of Part 410. *Clay v. Director*, 7 BLR 182 (1984). Under §410.490,[3] a miner will be presumed to be totally disabled by pneumoconiosis if the x-ray, biopsy or autopsy evidence establishes pneumoconiosis and it is established that the pneumoconiosis arose out of the miner's coal mine employment. In this case, as discussed under §727.203(a)(1), the x-ray evidence establishes pneumoconiosis. Under §410.416(a), pneumoconiosis will be presumed due to coal mine employment, where, as here, the miner had over ten years of coal mine employment. In addition, neither physician found that the miner's pneumoconiosis did not arise from his coal mine employment. Therefore, I find that the evidence establishes that the miner's pneumoconiosis arose out of his coal mine employment under §§410.416(a) and 410.490.

The §410.490 presumption of total disability due to pneumoconiosis can be rebutted only by evidence establishing that the Claimant is not vocationally disabled. *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277 (6th Cir. 1983). Since no evidence was offered to show that the miner could have returned to his coal mine employment, I find that the §410.490 presumption is unrebutted. Accordingly, I find under §410.490 that the miner was totally disabled by pneumoconiosis and, therefore, he is entitled to benefits.

VI. ENTITLEMENT

The Claimant, Hubert C. Taylor, is entitled to benefits under the Act.

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[3] Section 410.490 appears to preclude the use of this section in a Part C claim. However, the Third and Eighth Circuits have held that this regulation is applicable to all cases adjudicated under 30 U.S.C. §945. *Coughlan v. Director*, 757 F.2d 966 (8th Cir. 1985); *Halon v. Director*, 713 F.2d 21 (3rd Cir. 1983). Since this case was pending on March 1, 1978, it is being adjudicated under 30 U.S.C. §945(b)(1). While *Halon* is not binding on cases arising in the Sixth Circuit, I am persuaded by this Decision and a review of the Act that the use of §410.490 is appropriate. In addition, while the Sixth Circuit has not specifically addressed this issue, the court held in *Dickson v. Califano*, 590 F.2d 616 (6th Cir. 1978), that the Black Lung Benefits Reform Act of 1977 had the effect of making the interim presumption of the 1972 Act fully applicable to claims filed after June 30, 1973.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to Claimant is made herein because no application has been received from counsel. A period of thirty (30) days is hereby allowed for Claimant's counsel to submit an application. The application must conform to 20 C.F.R. §§725.365 and 725.366, which set forth the criteria on which the request will be considered. The application must be accompanied by a service sheet showing that service has been made upon all parties, including the Claimant and Solicitor as counsel for the Director. Parties so served have ten days (10) following receipt of any such application within which to file their objections. Counsel is forbidden by law to charge the Claimant any fee in the absence of the approval of such application.

VIII. ORDER

The Employer, Peabody Coal Company, is hereby ordered to:

1. Pay to the Claimant all benefits to which he is entitled under the Act, commencing June, 1977, augmented by reason of his dependent wife;

2. Pay to the Claimant all medical benefits to which he may be entitled;

3. Reimburse the Secretary of Labor for any payments the Secretary has made to the Claimant, and to deduct such amounts, as appropriate, from the amount the Employer is ordered to pay under paragraphs 1 and 2 above; and

4. Pay to the Secretary of Labor interest as provided by law from the date upon which any payment would originally have been due if payment had been made from the date set forth above until the date upon which payment is actually made.

/s/ Robert L. Hillyard

ROBERT L. HILLYARD
Administrative Law Judge

U.S. CONST.

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

30 U.S.C. § 901(a)

§ 901. Congressional findings and declaration of purpose; short title

(a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

30 U.S.C. § 902(f)

§ 902. Definitions

For purposes of this subchapter—

* * *

(f)(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) Such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

30 U.S.C. § 923(b)

§ 923. Filing of notice of claim

(b) Utilization of personnel and procedures; evidence required to establish claim; medical evidence; affidavits; autopsy reports; reimbursement of expenses

In carrying out the provisions of this part, the Secretary shall to the maximum extent feasible (and consistent with the provisions of this part) utilize the personnel and procedures he uses in determining entitlement to disability insurance benefit payments under section 223 of the Social Security Act [42 U.S.C.A. § 423], but no claim for benefits under this part shall be denied solely on the basis of the results of a chest roentgenogram. In determining the validity of claims under this part, all relevant evidence shall be considered, including, where relevant, medical tests such as blood gas studies, X-ray examination, electrocardiogram, pulmonary function studies, or physical performance tests, and any medical history, evidence submitted by the claimant's physician, or his wife's affidavits, and in the case of a deceased miner, other appropriate affidavits of persons with knowledge of the miner's physical condition, and other supportive materials. Where there is no medical or other relevant evidence in the case of a deceased miner, such affidavits, from persons not eligible for benefits in such case with respect to claims filed on or after the effective date of the Black Lung Benefits Amendments of 1981, shall be considered to be sufficient to establish that the miner was totally disabled due to pneumoconiosis or that his or her death was due to pneumoconiosis. In any case, other than that involving a claim filed on or after the effective date of the Black Lung Benefits Amendments of 1981, in which there is other evidence that a miner has a pulmonary or respiratory impairment, the Secretary shall accept a board certified or board eligible radiologist's interpretation of a chest roentgenogram which is of a quality sufficient to demonstrate the presence of pneumoconiosis submitted in support of a claim for benefits under this subchapter if such roentgenogram has been taken by a radiologist or qualified technician, except where the Secretary has reason to believe that the claim

has been fraudulently represented. In order to insure that any such roentgenogram is of adequate quality to demonstrate the presence of pneumoconiosis, and in order to provide for uniform quality in the roentgenograms, the Secretary of Labor may, by regulation, establish specific requirements for the techniques used to take roentgenograms of the chest. Unless the Secretary has good cause to believe that an autopsy report is not accurate, or that the condition of the miner is being fraudulently misrepresented, the Secretary shall accept such autopsy report concerning the presence of pneumoconiosis and the stage of advancement of pneumoconiosis. Claimants under this part shall be reimbursed for reasonable medical expenses incurred by them in establishing their claims. For purposes of determining total disability under this part, the provisions of subsections (a), (b), (c), (d), and (g) of section 221 of such Act [42 U.S.C.A. § 421(a) to (d), (g)] shall be applicable. The provisions of sections 204, 205(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 206, 207, and 208 of the Social Security Act [42 U.S.C.A. §§ 404, 405(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 406, 407, 408], shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under Title II of such Act [42 U.S.C.A. § 401 et seq.]. Each miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation.

30 U.S.C. § 932(c)

§ 932. Failure to meet workmen's compensation requirements

(c) Persons entitled to benefits

Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator; or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

20 C.F.R. § 410.490

§ 410.490 Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of his death, or his

death will be presumed to be due to pneumoconiosis, as the case may be, if:

(1) One of the following medical requirements is met:

(i) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the

blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

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No.

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IN THE

Supreme Court of the United States

October Term, 1989

PEABODY COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,
Petitioners,

v.

HUBERT C. TAYLOR and DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE NATIONAL COAL ASSOCIATION 2

REASONS FOR GRANTING THE WRIT 4

1. The Seventh Circuit's Decision is Manifestly Unjust to Mine Owners 4

2. The Implications for the Coal Industry's Obligations to the Black Lung Disability Trust Fund are Significant 5

3. The Insolvency of the Black Lung Disability Trust Fund has Led to a Substantial Increase in Coal Industry Tax Liability to Stabilize the Fund 7

4. The Seventh's Circuit's Decision Would Contribute to the Financial Difficulties of the Black Lung Disability Trust Fund 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases: Page

Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs,
890 F.2d 1295 (3d Cir. 1990) 4

Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers' Compensation Programs,
484 U.S. 135 (1987) 3

Pittston Coal Group v. Sebben,
109 S. Ct. 414 (1988) 3

Taylor v. Peabody Coal Co.,
892 F.2d 503 (7th Cir. 1989) 3, 4

Youghiogheny and Ohio Coal Co. v. Milliken,
866 F.2d 195 (6th Cir. 1989) 4

Statutes:

26 U.S.C. § 4121 ..... 2, 7

26 U.S.C. § 4121(a) 5, 7

26 U.S.C. § 4121(b) 6, 7

26 U.S.C. § 4121(e) 8

26 U.S.C. § 4121(e)(2) 9

26 U.S.C. § 9501

26 U.S.C. § 9501(a)(2) 2

26 U.S.C. § 9501(c) 8

26 U.S.C. § 9501(d) 2

26 U.S.C. § 9501(d)(4) 8

Page

Black Lung Benefits Act, 30 U.S.C. §§ 901-945 2

30 U.S.C. § 932 ..... 2, 5

30 U.S.C. § 933 2

30 U.S.C. § 932(c) 5

30 U.S.C. § 933(a) 5

Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978) 6

Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 2(a), 92 Stat. 211 (1978) 7

Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981) 7, 8

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203, 100 Stat. 312-13 (1986)

§ 13203(a) 7

§ 13203(b) 8

§ 13203(c) 8

Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503, 101 Stat. 1330-446 (1987) 8, 9

Legislative Materials:

H.R. Rep. No. 151, 95th Cong., 1st Sess. 26. *reprinted* in 1978 U.S. Code Cong. & Ad. News 262 6-7

Page

H.R. Rep. No. 241, 99th Cong., 2d Sess., pt. 1 at 75-76, *reprinted in* 1986 U.S. Code Cong. & Ad. News 653-54 9

Staff of Subcomm. on Oversight, House Comm. on Ways and Means, 97th Cong. 1st Sess., *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund* (Comm. Print 1981) 7

Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* (Comm. Print 1985) 6, 8

131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985) (remarks of Senators Heinz and Warner) 7

Administrative and Executive Materials:

20 C.F.R. § 410.490 (1989) 3, 9

20 C.F.R. § pt. 726 (1989) 5

20 C.F.R. § 727.203 (1989) 3, 6, 9

20 C.F.R. § 727.203(a) (1989) 7

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Page

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Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988* 9

Miscellaneous:

Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va. L. Rev. 677, 691 (1983) 7

Information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Sept. 26, 1986) 8

Information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Apr. 27, 1990) 6

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IN THE

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No.

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HUBERT C. TAYLOR and DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
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**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

BRIEF OF THE NATIONAL COAL ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Amicus Curiae National Coal Association respectfully submits that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit filed in this proceeding should be granted.

Pursuant to Rule 37 of the Rules of this Court, the parties to this case have by letters consented to the filing of the brief. Copies of their letters of consent have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE NATIONAL COAL ASSOCIATION

The National Coal Association ("NCA") is a trade association comprising approximately 150 members. NCA represents most of the nation's major coal producers. In addition to coal producing companies, NCA's membership includes coal brokers, equipment suppliers, coal transporters, consultants, electric utilities, resource developers and state coal associations.

NCA producer members, and all other U.S. coal producers are responsible for the payment of benefits to eligible claimants under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act"), in two direct ways: 1) as individual coal mine operator defendants in certain black lung cases, 30 U.S.C. §§ 932-933; and 2) as mandatory payors of a producers' tax into the Black Lung Disability Trust Fund ("BLDTF"), 26 U.S.C. § 4121. The BLDTF is administered by the Secretaries of Labor, Treasury, and Health and Human Services, 26 U.S.C. § 9501(a)(2). The BLDTF is used to pay black lung compensation awards to eligible claimants whose coal mine employment ended before January 1970; or in cases in which a responsible coal operator defendant cannot be identified, 26 U.S.C. § 9501(d). The BLDTF also pays the administrative costs of the Departments of Labor, Treasury, and Health and Human Services in operating the black lung program. Those costs amount to over $55 million in 1989.[1]

This Court is again being asked to resolve a conflict among the circuit courts over whether the Black Lung Benefits Act

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[1]U.S. Dep't of the Treasury, *Black Lung Disability Trust Fund, Status of Funds* (Sept. 30, 1989) (available through the U.S. Dep't of the Treasury) [hereinafter 1989 Report, *Trust Fund, Status*].

provides black lung defendants with a fair opportunity to be heard in a case filed under the Act's "interim presumption."[2]

In 1987, in *Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135 (1987), this Court made clear that this traditional right is secured by the Act. The language of the eligibility regulation there at issue, 20 C.F.R. § 727.203 (1989), involved the invocation of the interim presumption.

This case involves an undermining of the rebuttal portion of the DOL interim presumption regulations.

The Seventh Circuit's decision in *Taylor v. Peabody Coal Co.*, 892 F.2d 503, severely restricts, if it does not effectively eliminate the ability on rebuttal of a black lung defendant to introduce "medical" evidence on the most fundamental point in a black lung case — namely whether a coal miner suffers from, is disabled by, or died due to black lung disease. Medical proof is, by and large, the only proof that matters in a black lung case. The decision below, however, mandates the payment of black lung disability or death benefits by an employer notwithstanding the proven absence of occupational disease, related disability or death. This position of the Seventh Circuit directly conflicts with the positions taken by the Sixth

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[2]The black lung benefits program, as enacted by Congress, consists of two parts. The Part B program applies to claims filed by living miners before June 30, 1973 and before December 31, 1973 for survivors' claims and is federally funded. The Social Security Administration ("SSA") administered this program. The Part C program applies to claims filed after January 1, 1974, and is privately funded. The Department of Labor ("DOL") administers this program. *Pittston Coal Group v. Sebben*, 109 S. Ct. 414, 417 (1988). Both SSA and DOL have promulgated permanent and interim regulations but only the SSA interim regulations, 20 C.F.R. § 410.490 (1989), and the DOL interim regulations, 20 C.F.R. § 727.203 (1989), are directly at issue here. Both the SSA and DOL interim regulations set forth rebuttable presumptions of entitlement to black lung benefits.

Circuit in *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989), and the Third Circuit in *Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs*, 890 F.2d 1295 (3d Cir. 1990).

The ruling of the Seventh Circuit in *Taylor v. Peabody Coal Co.* is wrong, manifestly unjust and unreasonably would further undermine a black lung benefits program already in dire straits. The coal industry, therefore, urges this Court to review the Seventh Circuit's decision.

REASONS FOR GRANTING THE WRIT

NCA strongly supports and endorses the arguments as set forth by petitioners, and urges the Court to grant a writ of certiorari in the instant proceeding for the following reasons.

1. The Seventh Circuit's Decision is Manifestly Unjust to Mine Owners.

The critical premise of the opinion below is that mine owner defendants will not be afforded a reasonable opportunity to defend black lung claims adjudicated under an interim presumption. By prohibiting the consideration of pertinent and otherwise probative medical evidence in a rebuttal inquiry, the Seventh Circuit compels mine owners to pay black lung benefits to former employees and the survivors of deceased employees, whether or not there is any link between a worker's disability or death and employment in the mines. According to the Seventh Circuit, the necessary link is simply irrelevant.

The petitioners contend that Congress neither enacted nor intended such a result, and NCA urges the Court to carefully consider the arguments advanced in this regard. Beyond these legal points and the Due Process Clause questions they pose, however, the operative fact for coal operators is that they

have not, were not directed to, and cannot fund the excessive retroactive liabilities imposed. Since its original enactment, the Act has provided that no mine operator may be held responsible for total disability or death due to pneumoconiosis unless the miner suffers an adverse health effect and it arises at least in part out of coal dust exposure in the miner's employment with the mine operator. 30 U.S.C. § 932(c).

All claims subject to an interim presumption were filed prior to April 1, 1980, and the payment of each such claim is secured for the liabilities imposed under 30 U.S.C. § 932 only. That is the limit of the liability imposed by the Act. 30 U.S.C. § 933(a). All insuring arrangements devised to fund these liabilities were fixed on or before April 1, 1980, and none of them are even arguably subject to revision. *See* 20 C.F.R. pt. 726 (1989). The reasonable expectations reflected in these prior arrangements contemplate a risk of liability only where the essential link between adverse health effects due to dust exposure and the employment of the miner is present.

The link is a matter of medical fact. Its presence can be tested only in light of competent medical proof. In prohibiting the adjudication of ultimate facts in light of the only evidence that matters, the court below consigns the link to irrelevancy and thus deprives the black lung program and its carefully designed benefit funding mechanisms of any rationality. Congress could not have expressly enacted so unreasonable a law and NCA submits that Congress did not do so.

2. The Implications for the Coal Industry's Obligations to the Black Lung Disability Trust Fund are Significant.

The tax paid by coal producers into the BLDTF is currently set at $1.10 per ton on underground-mined coal and

$.55 per ton on surface-extracted coal. 26 U.S.C. § 4121(a), (b).[3] The BLDTF has collected over $5.66 billion in tonnage taxes from coal producers since 1978.[4] In fiscal year 1989, the nation's coal producers paid over $563 million into the BLDTF in tonnage taxes.[5]

Despite these substantial tax revenues there has been a continuing shortfall between black lung payment obligations of the BLDTF and the income from the producers' tax. Indeed, the BLDTF has paid out over $8.64 billion in benefits since 1978,[6] and in fiscal year 1989, disbursed over $593 million in benefits.[7] The massive growth in BLDTF liability is largely attattributable to the approval of approximately 96,000 previously denied claims by the Department of Labor (and to a lesser extent, the Social Security Administration) under the requirements of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), including the 20 C.F.R. § 727.203 interim presumption.[8] The approval rate greatly *exceeded* all Congressional projections.[9]

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[3]National Coal Association has provided information to this Court similar to that provided below showing the severe insolvency problems of the BLDTF. The information supplied here is the most recent information available.

[4]Staff of Joint Comm. on Taxation, 99th Cong., 2d Sess., *Summary Description of User Fees and Other Revenue Proposals in the President's Fiscal Year 1986 Budget, the Budget Resolution, and Certain Other Revenue Issues* 3 (Comm. Print 1985) [hereinafter 1985 Joint Comm. on Taxation *Summary*]; and information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Apr. 27, 1990).

[5]1989 Report, *Trust Fund, Status, supra* note 1.

[6]*See supra* note 4. This does not include costs of administration.

[7]1989 Report, *Trust Fund, Status, supra* note 1.

[8]Office of Workers' Compensation Programs, U.S. Dep't of Labor, *Black Lung Claims Status Report* (Feb. 20, 1987) (draft) (available through the U.S. Dep't of Labor).

[9]H.R. Rep. No. 151, 95th Cong., 1st Sess. 26, *reprinted in* 1978 U.S. Code Cong. & Ad. News 262. Prior to the 1978 amendments and the pro-

3. The Insolvency of the Black Lung Disability Trust Fund has Led to a Substantial Increase in Coal Industry Tax Liability to Stabilize the Fund.

To try to meet the shortfall between compensation levels and BLDTF revenue, the producers' tax has been increased twice from the 1978 rate of $.50 per ton on underground coal and $.25 per ton on surface-mined coal.[10] In 1981, the tax was increased 100% to $1.00 per ton (underground) and $.50 per ton (surface).[11] In 1985, the Administration proposed to again raise the tax, this time by 50%. Congress, however, acknowledging the coal industry *was in financial difficulty and should not be saddled with added black lung taxes, enacted only a 10% tax increase to reach the current levels of $1.10 per ton (underground) and $.55 per ton (surface).*[12]

In addition to the two tax increases, the BLDTF has been augmented by appropriations from the general treasury each year since its inception in 1978. These advances must be repaid by the BLDTF to the general treasury, with interest.

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mulgation of 20 C.F.R. § 727.203(a) (1989), fewer than 5,000 claims had been approved under Part C. *See* Lopatto, *The Federal Black Lung Program: A 1983 Primer*, 85 W.Va. L. Rev. 677, 691 (1983), citing Staff of Subcomm. on Oversight, House Comm. on Ways and Means, 97th Cong. 1st Sess., *Background Information for Hearings on the Insolvency Problems of the Black Lung Disability Trust Fund* 23 (Comm. Print 1981).

[10]Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 2(a), 92 Stat. 11 (1978).

[11]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981).

[12]*See* remarks of Senators Heinz and Warner, 131 Cong. Rec. S15,477-79 (daily ed. Nov. 14, 1985). Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, §13203(a), 100 Stat. 312 (1986) [hereinafter 1986 BLDTF Amendment]. 26 U.S.C. § 4121(a), (b).

26 U.S.C. § 9501(c)(d)(4).[13] The present cumulative debt of the BLDTF in unpaid advances and interest is approximately $3.049 billion, of which $1.032 billion is accumulated interest on advances.[14]

Under a 1981 amendment to the Internal Revenue Code,[15] the producers' tonnage tax was to revert to the lower 1978 rate by January 1, 1996, or when there was neither a balance of repayable advances nor interest owed by the BLDTF, whichever date was earlier.[16] However, even before the Seventh Circuit decision, *the ability of the BLDTF to achieve solvency by 1996 was dubious*.[17] When the Administration attempted to increase the tax by 50% in 1985, the Department of Labor predicted that the advance and interest necessary to meet BLDTF obligations could reach $30 billion

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[13]The 1986 BLDTF Amendment placed a five-year moratorium on interest accruals with respect to advances to the BLDTF. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(b), 100 Stat. 312 (1986).

[14]U.S. Dep't of Labor, *Black Lung Disability Trust Fund, Statement of Financial Condition* (Mar. 1990) (supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, to Bruce Watzman, NCA (Apr. 25, 1990)).

[15]Black Lung Benefits Revenue Act of 1981, Pub. L. No. 97-119, § 102(a), 95 Stat. 1635 (1981).

[16]26 U.S.C. § 4121(e), *as amended by* the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13203(c), 100 Stat. 313 (1986) (prior to amendment of Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 10503, 101 Stat. 1330-446 (1987)).

[17]1985 Joint Committee on Taxation *Summary*, *supra* note 4; and based on information supplied by James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, in a telephone interview with Bruce Watzman, NCA (Sept. 26, 1986).

by the year 2010. H.R. Rep. No. 241, 99th Cong. 2d Sess., pt. 1 at 75-76, *reprinted in* 1986 U.S. Code Cong. & Ad. News 653-54. Congress, in 1987, recognized the inability of the Fund to meet its obligations. Although it rejected the President's proposal in his fiscal year 1988 federal budget to increase the tax on producers to raise $400 million in additional revenues,[18] it still imposed an additional burden on producers.

Congress extended the date by which the producers' tonnage tax is to revert to the lower 1978 rate by an additional 18 years, *i.e.*, until January 1, 2014.[19]

4. The Seventh's Circuit's Decision Would Contribute to the Financial Difficulties of the Black Lung Disability Trust Fund.

The chronic insolvency of the BLDTF arises as a result of the exceptionally generous entitlement formula contained in the Department of Labor's interim presumption, *i.e.*, 20 C.F.R. § 727.203. Coal tax increases and the executive branch's requests to Congress for still larger increases arise solely within this context. None of the proposals were generated by any expectation or belief that the BLDTF needed revenues sufficient to pay Department of Labor claims under the SSA eligibility rules of 20 C.F.R. § 410.490.

The Seventh Circuit's decision will exacerbate the financial difficulties of the BLDTF and will also add significantly to the

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[18]Executive Office of the President, Office of Management and Budget, *Budget of the U.S. Government, Fiscal Year 1988*, at 2-41. If enacted, this revenue proposal would have meant an increase of the tax to approximately $1.75 per ton on underground coal and $.88 per ton on surface-mined coal.

[19]Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 99-203, § 10503, 101 Stat. 1330-446 (1987), *amending* 26 U.S.C. § 4121(e)(2).

direct liability of individual mine owners.[20] These circumstances arise, in NCA's view, on the premise reflected in the Seventh Circuit's decision, that these statutory benefits should be available whether or not the miner really has black lung disease or is disabled for work as a result of the disease. NCA does not believe that Congress intended this result or that the Seventh Circuit was correct in reaching it.

Increased revenues will thus be needed at a time when the BLDTF is already in an exceedingly precarious financial state, *and* when the Congress has acknowledged that the coal industry should not be burdened with further new black lung taxes. The Seventh Circuit's decision will not only impede the return of the producer's tax to a lower level, it most likely will contribute to a perpetual BLDTF deficit requiring additional advances from the Department of the Treasury and concomitant tax increases.

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[20]Industry actuaries and the government view the present value of federal black lung claims at $1.5 billion dollars per 10,000 awarded claims. Information supplied by Robert K. Briscoe, Milliman & Robertson, Inc., Consulting Actuaries, N.Y., N.Y. and James DeMarce, Director for the Division of Coal Mine Workers' Compensation, U.S. Dep't of Labor, in separate telephone interviews with Herve Levin, sole practitioner, Dallas, Tex. and consultant to Milliman & Robertson, Inc., Consulting Actuaries (Apr. 27, 1990).

CONCLUSION

The holding of the Seventh Circuit is unprecedented. It assigns black lung liability without regard to any reasonable or logical theory of responsibility. NCA urges this Court to grant the writ of certiorari, and to reverse the Seventh Circuit's decision.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1990

PEABODY COAL COMPANY AND
OLD REPUBLIC INSURANCE COMPANY, PETITIONERS

v.

HUBERT C. TAYLOR AND DIRECTOR,
OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTIONS PRESENTED

1. Whether the rebuttal provisions of a Department of Labor regulation satisfy Section 402(f)(2) of the Black Lung Benefits Act, which requires the Department to apply "[c]riteria * * * not more restrictive" than criteria applied during an earlier phase of the black lung program.

2. Whether the statute, if construed to invalidate the Department's rebuttal provisions, violates the constitutional guarantee of due process.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	6
Conclusion	15

TABLE OF AUTHORITIES

Cases.

Bethenergy Mines, Inc. v. *Director, OWCP,* 890 F.2d 1295 (3d Cir. 1989), petition for cert. pending *sub nom. Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714 ..... 6, 11, 12, 15

Dayton v. *Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), petition for cert. pending, No. 90-114 ..... 7, 14

Director, OWCP v. *Beatrice Pocahontas Co.*, 698 F.2d 680 (4th Cir. 1983) 11

Haywood v. *Secretary of Health & Human Services*, 699 F.2d 277 (6th Cir. 1983) 4

Krahel v. *Consolidation Coal Co.*, No. 89-2394 (4th Cir. Apr. 5, 1990) 7

Martin v. *Alabama By-Prods. Corp.*, 864 F.2d 1555 (11th Cir. 1989) 12

Meyer v. *Zeigler Coal Co.*, 894 F.2d 902 (7th Cir. 1990), petition for cert. pending, No. 89-7383 8

Mullins Coal Co. v. *Director, OWCP,* 484 U.S. 135 (1987) 11

Pittston Coal Group v. *Sebben,* 109 S. Ct. 414 (1988) 2, 4, 6, 9

Ramey v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985) 11

Robinette v. *Director, OWCP,* No. 88-1144 (4th Cir. Apr. 27, 1990) 7, 9

Sherry v. *Tesone Coal Co.*, 4 Black Lung Rep. (MB) 1-377 (Ben. Rev. Bd.), aff'd, 696 F.2d 985 (3d Cir. 1982) 11

Cases—Continued: Page

Snyder v. *Buck*, 340 U.S. 15 (1950) 14
Taft v. *Alabama By-Products Corp.*, 733 F.2d 1518 (11th Cir. 1984) 11
Taylor v. *Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), petition for cert. pending, No. 90-113 ..... 7, 8, 9
Wetherill v. *Director, OWCP*, 812 F.2d 376 (7th Cir. 1987) 10
Wright v. *Island Creek Coal Co.*, 824 F.2d 505 (6th Cir. 1987) 13
Youghiogheny & Ohio Coal Co. v. *Milliken*, 866 F.2d 195 (6th Cir. 1989) 5, 6

Statutes, regulations and rules:

Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* 2
§ 402(f)(2), 30 U.S.C. 902(f)(2) 2, 4, 5, 6, 7, 9, 11, 12

20 C.F.R.:

Section 410.490 2
Section 410.490(b)(1) 2
Section 410.490(c)(1)-(2) 3
Section 727.203 ..... 2, 11
Section 727.203(a)(1)-(5) 2
Section 727.203(b)(1)-(2) 3
Section 727.203(b)(3) 3, 6, 10
Section 727.203(b)(4) 13

Sup. Ct. R.:

Rule 35.1 13
Rule 40.1 (1980) 13

Miscellaneous:

Employment Standards Admin., United States Dep't of Labor, *Annual Report on Administration of the Black Lung Benefits Act for Calendar Year 1979* (1980) 9
43 Fed. Reg. 36,826 (1978) 11
Prunty & Solomons, *The Federal Black Lung Programs: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665 (1989) 12

In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a-14a) and its order denying rehearing (Pet. App. 1a-2a) are reported at 892 F.2d 503. The court of appeals' earlier opinion in this case (Pet. App. 18a-22a) is reported at 838 F.2d 227. The decision and order of the Benefits Review Board (Pet. App. 24a-27a) and the decision and order of the administrative law judge (Pet. App. 28a-40a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 28, 1989, and the order denying petitions for rehearing was entered on February 1, 1990. Pet. App. 1a-2a. The petition for a writ of certiorari was filed on May 2, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Black Lung Benefits Act, 30 U.S.C. 901 *et seq.*, provides benefits to former coal miners and their survivors for total disability or death due to pneumoconiosis. Disability claims filed by June 30, 1973, were considered by the Department of Health, Education, and Welfare (HEW) under regulations that included a presumption of entitlement to benefits (20 C.F.R. 410.490) that was available to certain claimants. Claims filed after that date are considered by the Department of Labor. Claims filed with the Department of Labor before April 1, 1980, are subject to Section 402(f)(2) of the statute, 30 U.S.C. 902(f)(2), which provides that the "[c]riteria" applied to those claims "shall not be more restrictive than the criteria applicable to a claim" adjudicated by HEW. See *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414, 417-419 (1988).

In response to Section 402(f)(2), Labor promulgated its own presumption regulation, 20 C.F.R. 727.203. While there were only two ways to invoke HEW's presumption (see 20 C.F.R. 410.490(b)(1)), there are five ways to invoke Labor's presumption. See 20 C.F.R. 727.203(a)(1)-(5). Once the presumption had been invoked, HEW's regulation specified that the presumption could be rebutted (1) by proving that the miner was doing his usual coal mine

work or comparable work or (2) by proving that the miner was capable of doing such work. 20 C.F.R. 410.490(c)(1) and (2). In contrast, Labor's regulation specifies four rebuttal methods. The first two generally correspond to the two specified HEW methods. 20 C.F.R. 727.203(b)(1) and (2). The third and fourth Labor methods allow a party contesting entitlement to defeat a claim either (3) by proving that the disability or death of the miner did not arise in whole or in part from coal mine employment or (4) by proving that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4).

2. In 1977, after 42 years of coal mining, respondent Hubert Taylor applied for black lung benefits. Pet. App. 29a, 31a. A deputy commissioner in the Department of Labor's Office of Workers' Compensation Programs (OWCP) initially found him eligible for benefits, but petitioner Peabody Coal Company, the responsible coal mine operator, contested eligibility and obtained a hearing before an administrative law judge. Pet. App. 30a.

The ALJ concluded that Taylor would be ineligible for benefits under Labor's interim presumption. The ALJ concluded that Taylor had invoked the presumption of eligibility based on his 42 years of coal mining and on x-ray evidence showing pneumoconiosis. Pet. App. 6a, 36a. But the ALJ found that Peabody Coal had rebutted the presumption under Labor's second method of rebuttal (20 C.F.R. 727.203(b)(2)) by proving that Taylor had only a mild respiratory impairment that did not prevent him from doing his usual coal mine work. Pet. App. 6a, 37a-38a.

However, the ALJ concluded that HEW's regulation applied to the claim and awarded benefits. Pet. App. 39a n.3. Under HEW's regulation, Taylor's

coal mine-related pneumoconiosis also invoked a presumption of eligibility. *Id.* at 39a. Although HEW's second rebuttal provision was very similar to Labor's, the ALJ concluded that rebuttal was unavailable under Labor's method because HEW's regulation had been construed differently. Specifically, in *Haywood* v. *Secretary of Health & Human Services*, 699 F.2d 277 (6th Cir. 1983), the court held that under HEW's second provision the presumption "can be rebutted only by evidence establishing that the Claimant is not vocationally disabled." That is, the court concluded that under HEW's provision, the Secretary had to show that the claimant could obtain work as a miner in the immediate area of his residence. Pet. App. 39a; see also *Haywood*, 699 F.2d at 285. Because "no evidence was offered" to show that Taylor could return to coal mine work in the area where he lived, the ALJ found HEW's presumption unrebutted and held that Taylor was entitled to benefits. Pet. App. 39a.

2. The Benefits Review Board reversed. Pet. App. 24a-27a. The Board held that Labor's regulation applied, rather than HEW's. *Id.* at 26a. Because Taylor had not challenged the ALJ's finding of rebuttal under Labor's regulation, the Board affirmed the denial of benefits on that basis. *Id.* at 27a.

3. The court of appeals affirmed. Pet. App. 18a-22a. It agreed with the Board that Section 402(f)(2) of the statute required Labor only to apply *medical* criteria that were no more restrictive than HEW's medical criteria, and did not require Labor to apply all of HEW's other rules. Pet. App. 21a-22a. After this Court rejected that reading of the statute in *Sebben* (109 S. Ct. at 421), it vacated the court of appeals' decision in this case and remanded for reconsideration in light of *Sebben*. Pet. App. 23a.

4. On remand, the court of appeals reinstated the ALJ's award of benefits. Pet. App. 4a-14a. The court did not state which rebuttal methods were at issue in the case, but it determined that Labor's "criteria" generally differed from HEW's because "all relevant medical evidence" must be considered under Labor's rebuttal provisions, while HEW's presumption "cannot be rebutted by medical evidence." *Id.* at 8a. Moreover, in the court's view, HEW's regulation did not allow rebuttal by Labor's third method (proof, by medical evidence, that total disability or death did not arise in whole or in part from coal mining) or Labor's fourth method (proof, by medical evidence, that the miner does not or did not have pneumoconiosis). *Ibid.* Labor's consideration of medical evidence, in the court's view, violated the statute. *Id.* at 9a.

The court recognized that the Sixth Circuit had upheld Labor's rebuttal provisions in *Youghiogheny & Ohio Coal Co.*, v. *Milliken*, 866 F.2d 195 (1989), and other cases, but "respectfully disagree[d]" with the Sixth Circuit's decisions. Pet. App. 9a. The court also rejected Peabody Coal's argument that precluding proof that petitioner is not totally disabled on account of pneumoconiosis violated due process. *Id.* at 13a. In the court's view, Section 402(f)(2), "in forbidding consideration of certain criteria on rebuttal, [does not] operate[] in a 'purely arbitrary' manner." Pet. App. 13a.

In an order denying rehearing, the court suggested that there might be some circumstances when HEW's regulation allowed medical rebuttal, but reaffirmed that "to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid." Pet. App. 2a.

ARGUMENT

We agree with petitioners that the court of appeals erred with respect to the questions presented for review and that this Court should review those questions. The same questions are presented, however, in other cases pending before this Court, and we do not believe that this case is an appropriate vehicle for plenary consideration.

1. In *Pittston Coal Group* v. *Sebben*, 109 S. Ct. 414 (1988), this Court held that the *invocation* portion of Labor's presumption (which is not at issue here) violates Section 402(f)(2)'s command to apply "criteria" no more restrictive than those applied by HEW. The Court did not decide whether Labor's *rebuttal* provisions were valid because the respondents in *Sebben* had conceded their validity. 109 S. Ct. at 423. For the same reason, the Court did not decide whether application of Labor's rebuttal methods was constitutionally required. *Ibid.*

Since *Sebben*, four courts of appeals have addressed the validity of Labor's rebuttal provisions. The Third and Sixth Circuits have upheld the provisions. *Bethenergy Mines, Inc.* v. *Director, OWCP*, 890 F.2d 1295 (3d Cir. 1989), petition for cert. pending *sub nom. Pauley* v. *Bethenergy Mines, Inc.*, No. 89-1714 (filed May 7, 1990); *Youghiogheny & Ohio Coal Co.* v. *Milliken*, 866 F.2d 195 (6th Cir. 1989). In both of those cases, miners invoked Labor's presumption by proving the existence of pneumoconiosis. 890 F.2d at 1296; 866 F.2d at 197. In both cases, benefits were denied because coal mine operators proved under Labor's third rebuttal method (20 C.F.R. 727.203(b)(3)) that the miners' disabilities did not arise in whole or in part from the disease. 890 F.2d at 1296, 1299; 866 F.2d at 197.

The court below and the Fourth Circuit, on somewhat different facts, have invalidated parts of Labor's rebuttal regulation. In *Taylor* v. *Clinchfield Coal Co.*, 895 F.2d 178 (4th Cir. 1990), petition for cert. pending, No. 90-113 (filed July 17, 1990), an ALJ concluded that a miner who had invoked the presumption did not have pneumoconiosis, so that the relevant operator had rebutted the presumption under Labor's fourth method. 895 F.2d at 179. The ALJ also concluded that the miner was not totally disabled (in whole or in part) as a result of pneumoconiosis, so that the presumption had been rebutted under Labor's third method as well. *Ibid.* The Fourth Circuit concluded that Labor's four rebuttal methods "permit rebuttal of more elements of entitlement than do the interim HEW regulations which permit rebuttal solely through attacks on the element of total disability," and held that they were contrary to Section 402(f)(2). 895 F.2d at 182-183. Accord *Dayton* v. *Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990), petition for cert. pending, No. 90-114 (filed July 17, 1990).[1]

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[1] In *Taylor* v. *Clinchfield Coal*, the Fourth Circuit found no substantial evidence of rebuttal under Labor's third method, but suggested that HEW's regulation might have allowed a third method of rebuttal "similar" to Labor's third method, and remanded for consideration of that issue. 895 F.2d at 183. In an unpublished decision following *Taylor* v. *Clinchfield Coal*, the court concluded that this suggestion was "dicta" and that HEW's regulation allowed only two rebuttal methods. *Robinette* v. *Director, OWCP*, No. 88-1144 (4th Cir. Apr. 27, 1990), slip op. 8 & n.9, petition for cert. pending (filed July 25, 1990). See also *Krahel* v. *Consolidation Coal Co.*, No. 89-2394 (4th Cir. Apr. 5, 1990) (unpublished), slip op. 5-6 ("we have recently held that application of the rebuttal provisions of 20 C.F.R. § 727.203(b)(3) and (4) violates 30 U.S.C. § 902(f)").

In this case, an ALJ concluded that the presumption had been rebutted under Labor's second method by medical evidence that the miner had only a mild respiratory impairment that did not prevent him from doing his usual coal mine work. Pet. App. 37a-38a. The ALJ awarded benefits on the theory that HEW's second rebuttal method, unlike Labor's second method, required proof that a miner was not "vocationally disabled," *i.e.*, could actually obtain work as a miner. *Id.* at 39a.

While this case turns on a narrow issue relating to the second rebuttal provision, the court of appeals, in affirming the award of benefits, spoke broadly. It construed HEW's regulation not to allow rebuttal by medical evidence generally or by medical evidence satisfying Labor's third or fourth rebuttal methods. Pet. App. 8a. Because Labor's rebuttal rules allow consideration of such evidence, the court concluded that the rules violated the statute. *Id.* at 9a. In its order denying rehearing, the court suggested that some medical evidence could be considered under HEW's regulation, but confirmed that it had "held that to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid." *Id.* at 1a-2a. See also *Meyer* v. *Zeigler Coal Co.*, 894 F.2d 902, 905 n.3 (7th Cir. 1990) ("this court held in [*Taylor* v. *Peabody Coal*] that § 727.203(b)(3) was invalid"), petition for cert. pending, No. 89-7383 (filed Apr. 27, 1990).

The courts of appeals have acknowledged the conflict. Both the Fourth Circuit, 895 F.2d at 183 n.2, and the court below, Pet. App. 9a-11a, noted their disagreement with the approach of the Sixth Circuit. The Third Circuit also noted the conflict between the

Sixth Circuit and the court below "as to issues similar to those before us," and declined to attempt to harmonize the decisions. 890 F.2d at 1302-1303. And the dissenting judge in the Fourth Circuit recognized the conflict among all four circuits, stating that "[i]t seems to me that by adopting the views of the Third and Sixth Circuits concerning these murky and confusing regulations we [would] do less violence to congressional intent, and [would] avoid both upsetting the statutory scheme and raising due process problems." 895 F.2d at 184; see also *Robinette* v. *Director, OWCP*, No. 88-1144 (4th Cir. Apr. 27, 1990) (unpublished), slip op. 7-8 n.8 (asking the Court to "definitively resolve this conflict"), petition for cert. pending (filed July 25, 1990).

2. In our view, the conflict in the circuits requires this Court's resolution.[2] However, we do not believe that this case should be the vehicle for plenary consideration. The primary issue here is a narrow one relating to the validity of one aspect of Labor's sec-

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[2] Although Section 402(f)(2) applies only to claims filed before April 1, 1980 (see *Sebben*, 109 S. Ct. at 418-419), the conflict among the courts of appeals can still be expected to have a significant, detrimental impact on the administration of the black lung program. An estimated 2,000 to 3,500 claims governed by Section 402(f)(2) are still in litigation, and we believe that a high percentage of them are affected by the conflict. Because the present value of a single black lung claim has been estimated at between $118,316 and $185,656, see Employment Standarads Admin., United States Dep't of Labor, *Annual Report on Administration of the Black Lung Benefits Act for Calendar Year 1979*, at 32 (1980), the claims have great importance to individual claimants and, given their cumulative value (as much as $650 million), great importance to the coal industry.

ond rebuttal method—whether a coal mine operator must present vocational evidence showing that a claimant can obtain coal mine work in order to rebut the presumption. Regardless of this Court's resolution of this issue, it would be unnecessary in the circumstances of this case for the Court to address directly the permissibility of Labor's third and fourth rebuttal methods.[3]

Furthermore, consideration of the validity of Labor's second method of rebuttal raises issues different from those raised by the third and fourth methods. As discussed above, the language of Labor's second method is materially the same as the language of HEW's second method. The ALJ's decision requiring vocational evidence (proof of a miner's ability to obtain coal mine work in the immediate area of his residence) under HEW's regulation was based solely on the Sixth Circuit's 1983 construction of that regulation in *Haywood*. See Pet. App. 39a; 699 F.2d at

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[3] The ALJ found that the operator had failed to rebut under either the third or fourth methods (Pet. App. 38a), and the court of appeals did not address the ALJ's findings. Moreover, the ALJ's findings appear to be correct. Labor's third rebuttal method requires proof that a disability did not arise "in whole or in part" from coal mine employment, and its fourth method requires proof that the miner does not or did not have pneumoconiosis. 20 C.F.R. 727.203(b)(3) and (4). It is undisputed that respondent Taylor had pneumoconiosis, the method by which he invoked Labor's presumption, and substantial evidence will likely support the ALJ's finding that this disease, although mild, contributed to his disability. Pet. App. 38a. Cf. *Wetherill* v. *Director, OWCP*, 812 F.2d 376, 380 (7th Cir. 1987) (proof of *no* respiratory impairment, while probably insufficient under Labor's second method, would rebut under the third method).

285. The issues concerning Labor's second method are therefore whether *Haywood* correctly construed HEW's language—contrary to other interpretations of identical language in Labor's regulation [4]—and, if so, whether Section 402(f)(2) required Labor to adopt this interpretation when it promulgated 20 C.F.R. 727.203.

Neither of these issues is relevant to determining the validity of Labor's third and fourth rebuttal methods. These latter methods involve inquiries into whether a miner's disease or disability arose out of coal mine employment, while the second method relates to whether a miner is totally disabled. See *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 150-151 n.26 (1987). One question concerning the validity of the third and fourth methods is therefore whether HEW's regulation, which specified rebuttal only by methods comparable to Labor's first two rebuttal methods, nevertheless allowed the inquiries into causation that take place under Labor's third and fourth methods. If the Department of Labor correctly concluded that HEW did allow such inquiries, then Labor's third and fourth methods are valid. See 43 Fed. Reg. 36,826 (1978) (Department of Labor's view that HEW did allow four methods); *Bethenergy*, 890 F.2d at 1302 & n.8 (agreeing with

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[4] The courts of appeals have by and large construed Labor's "usual coal mine work" rebuttal method not to require vocational evidence. See *Ramey* v. *Kentland Elkhorn Coal Corp.*, 755 F.2d 485 (6th Cir. 1985); *Taft* v. *Alabama By-Products Corp.*, 733 F.2d 1518 (11th Cir. 1984); *Director, OWCP* v. *Beatrice Pocahontas Co.*, 698 F.2d 680 (4th Cir. 1983); *Sherry* v. *Tesone Coal Co.*, 4 Black Lung Rep. (MB) 1-377 (Ben. Rev. Bd.), aff'd, 696 F.2d 985 (3d Cir. 1982).

the Department). If HEW's regulation did not allow such inquiries, then the validity of Labor's third and fourth methods turns on whether Section 402(f)(2) required Labor to limit rebuttal to the two HEW methods. See *Bethenergy*, 890 F.2d at 1299-1301 (statute does not prohibit these inquiries). Petitioners' due process argument similarly relates to the third and fourth methods, as they contend that it would be unconstitutional to order them to pay benefits without permitting them to prove that the claimant is not totally disabled as a result of coal mine employment. See Pet. 18-21. That due process argument has no bearing on the question whether a coal mine operator must present vocational evidence in order to rebut the presumption.

We believe the Court should grant review in a case where Labor's third and fourth methods are directly at issue. Those methods are more important than the second method because they allow a broader range of rebuttal. Parties contesting eligibility do not frequently succeed under Labor's second method because recent courts of appeals decisions require them to prove under this method that a miner does not have *any* impairment, respiratory or nonrespiratory, that prevents him from doing his usual coal mine work. See, *e.g.*, *Martin* v. *Alabama By-Prods. Corp.*, 864 F.2d 1555, 1557 (11th Cir. 1989), and cases cited.[5] In contrast, proof of the absence of any respiratory or pulmonary impairment will rebut under Labor's

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[5] The ALJ, who decided this case before those court decisions had been issued, erroneously found rebuttal under Labor's second method by proof that the claimant was not totally disabled as a result of a respiratory or pulmonary condition. Pet. App. 37a-38a. The claimant did not challenge this finding, however. *Id.* at 27a.

third method, *Wright* v. *Island Creek Coal Co.*, 824 F.2d 505 (6th Cir. 1987), and proof that a respiratory or pulmonary impairment is not pneumoconiosis will rebut under Labor's fourth method, see 20 C.F.R. 727.203(b)(4). Because applicants for black lung benefits are frequently aging miners who have some disability, Labor's third and fourth methods usually provide the only realistic possibilities of rebutting a presumption of entitlement. See also Prunty & Solomons, *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665, 695 (1989) (agreeing that Labor's second method is unavailable in most cases).

3. If the Court decides to review the validity of Labor's third and fourth methods in an appropriate case, we do not believe it necessary for the Court to grant review in this case as well in order to determine the validity of Labor's second rebuttal method. As discussed above, the second method is distinct from and not as important as the third and fourth methods. Moreover, the court below viewed the issue so broadly that it did not address the specific issues regarding the validity of Labor's second method; indeed, it did not seem to recognize that the case turns on whether Labor's second rebuttal method requires vocational evidence. These factors would likely create unnecessary complications for the Court.

In addition, respondent Hubert Taylor died on April 27, 1988, 12 days after he filed the prior petition for a writ of certiorari in this case. We believe it would have been proper for this Court to grant a timely motion to substitute his personal representative. But Rule 35.1 of the Rules of this Court (formerly Rule 40.1) provides that "[t]he substitution of

a representative of the deceased * * * must be made within six months after the death of the party, or the case shall abate," and no such motion was made within the specified period. See *Snyder* v. *Buck*, 340 U.S. 15, 21 (1950).

In May 1990, Mr. Taylor's representative filed a motion for substitution in this Court.[6] If the Court concludes that the action has not abated and grants the substitution motion, the proper disposition, in our view, is for the Court to hold this case while it determines the validity of Labor's third and fourth rebuttal methods by reviewing one of the other pending cases. The court below appears to have believed that it invalidated Labor's third and fourth methods, as well as its second, by characterizing its decision as holding that "to the extent the Department of Labor regulations allow rebuttal—when HEW's do not—the Labor rules are invalid." Pet. App. 2a. If this Court upholds the validity of the third and fourth methods, the rationale for the decision below would presumably be undermined and the court of appeals should therefore have an opportunity for reconsideration of that decision.

---

[6] The Court had not acted on this motion by July 20, 1990.

CONCLUSION

If the substitution motion is granted, the petition for a writ of certiorari should be held and disposed of as appropriate in light of the disposition of the petition in *Pauley* v. *Bethenergy Mines Corp.*, No. 89-1714, or *Consolidation Coal Co.* v. *Dayton*, No. 90-114.[7]

Respectfully submitted.

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JULY 1990

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[7] In our responses to the certiorari petitions in these two cases, we set forth more fully our reasons for believing that, of the petitions currently before the Court, they are the strongest candidates for plenary consideration.

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No. 89-1696

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PEABODY COAL COMPANY and
OLD REPUBLIC INSURANCE COMPANY,
Petitioners,

v.

HUBERT C. TAYLOR and
DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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PETITIONERS' REPLY

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Adkins v. U.S. Department of Labor, 824 F.2d 287 (4th Cir. 1987)	4
Clinchfield Coal Co. v. Director, Office of Workers' Compensation Programs, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-113)	2
Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-114)	2,6
Cox v. Benefits Review Board, 791 F.2d 445 (6th Cir. 1986)	3
Director, Office of Workers' Compensation Programs v. Beatrice Pocahontas Co., 698 F.2d 680 (4th Cir. 1983)	5
E.E.O.C. v. Federal Labor Relations Authority, 476 U.S. 19 (1986)	4
Kertesz v. Crescent Hills Coal Co., 788 F.2d 158 (3d Cir. 1986)	4
Meyer v. Zeigler Coal Co., 894 F.2d 902 (7th Cir. 1990), *petition for cert. pending*, No. 89-7383 (filed Apr. 27, 1990)	5
Mitchelson v. Director, Office of Workers' Compensation Programs, 880 F.2d 265 (10th Cir. 1989)	5
Neace v. Director, Office of Workers' Compensation Programs, 867 F.2d 264 (6th Cir. 1989)	5
O'Keeffe v. Aerojet General Shipyards, Inc., 404 U.S. 254 (1971)	7
Pauley v. BethEnergy Mines, Inc., 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714)	2,6
Pittston Coal Group v. Sebben, 488 U.S. 105 (1988)	2

Table of Authorities Continued

	Page
Wetherill v. Director, Office of Workers' Compensation Programs, 812 F.2d 376 (7th Cir. 1987)	4
Wright v. Island Creek Coal Co., 824 F.2d 505 (6th Cir. 1987)	4
Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195 (6th Cir. 1989)	2
Statutes and Regulations:	
Black Lung Benefits Act, as amended, 30 U.S.C. §§ 901-945 (1988)	
Section 402(f)(2), 30 U.S.C. § 902(f)(2) (1988)	2
Section 422(a), 30 U.S.C. § 932(a) (1988)	7
Longshore Act, as amended, 33 U.S.C. §§ 901-952 (1988)	
Section 21(c), 33 U.S.C. § 921(c) (1988)	6
Section 22, 33 U.S.C. § 922 (1988)	7
Social Security Administration Regulations	
20 C.F.R. § 410.490 (1990)	2
Department of Labor Regulations	
20 C.F.R. § 727.203(b) (1990)	1
20 C.F.R. § 727.203(b)(2) (1990)	*passim*
20 C.F.R. § 727.203(b)(3) (1990)	6
20 C.F.R. § 727.203(b)(4) (1990)	6
20 C.F.R. § 802.205(b) (1990)	3
Miscellaneous:	
Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 87-1720	3
Supplemental Brief for the Federal Respondent in No. 89-1714	4

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PETITIONERS' REPLY

INTRODUCTION

This petition for a writ of certiorari seeks review of a disagreement among the circuits concerning the relevance of medical evidence in a rebuttal inquiry under the black lung interim presumption. 20 C.F.R. § 727.203(b) (1990). The court of appeals invalidated the rule in this regard, feeling compelled to do so by

this Court's interpretation of 30 U.S.C. § 902(f)(2) in *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988). The Sixth Circuit previously rejected this conclusion. *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). Three additional petitions for writs of certiorari presenting a closely related disagreement between the Third Circuit and the Fourth Circuit are currently pending. *Pauley v. BethEnergy Mines, Inc.*, 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714); *Clinchfield Coal Co. v. Director, Office of Workers' Compensation Programs*, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-113); *Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs*, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-114). A motion to consolidate all four cases recently has been filed by the mine operators involved.

The Department of Labor ("DOL") and Hubert Taylor have responded to Peabody Coal Company's ("Peabody") petition. This Reply is submitted to preserve Peabody's rights with respect to new matter introduced in these responses.

ARGUMENT

I.

Hubert Taylor's opposition to certiorari rests on the premise that he does not need the Social Security Administration's ("SSA") presumption (20 C.F.R. § 410.490 (1990)) in order to obtain an award of black lung benefits, because they must be awarded under the DOL rule. In particular, Taylor theorizes that the administrative law judge ("ALJ") erroneously found rebuttal of the DOL presumption under the second method, 20 C.F.R. § 727.203(b)(2), on the basis of proof that Taylor suffered no pulmonary disability.

Brief of Respondent Hubert C. Taylor in Opposition at 9-13. This argument provides no basis for the denial of an otherwise proper writ of certiorari (1) because it was waived long ago, and (2) because it is incorrect.

When Taylor's claim was decided by an ALJ in 1985, the ALJ held that benefits could not be awarded under the DOL presumption and could only be awarded under the SSA version. App. 38a-39a. Taylor did not cross-appeal from the denial of his claim under the DOL rule after Peabody appealed the award under the SSA rule.[1] The Benefits Review Board then held: "Finally, we affirm the . . . finding of rebuttal under section 727.203(b)(2) [the DOL rule] since this determination was not challenged on appeal." App. 27a. Taylor never presented the issue to the Seventh Circuit, relying instead exclusively on his belief that he was entitled to prevail under the SSA rule. *See* App. 20a. Neither was his current theory suggested in Taylor's 1988 petition for certiorari to this Court. Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, No. 87-1720, at (i), (8).

Taylor long ago waived his right to claim entitlement under the DOL rule by failing to exhaust his administrative or judicial remedies in this regard.[2]

---

[1] The regulations of the Benefits Review Board expressly provide for the filing of a cross-appeal within fourteen days after the filing of a direct appeal by an adverse party. 20 C.F.R. § 802.205(b) (1990).

[2] The courts of appeals are in agreement that the failure of a party in a black lung claim to properly raise an issue in the course of administrative proceedings precludes consideration of the matter by the court. *See, e.g., Cox v. Benefits Review Bd.*, 791 F.2d 445, 447 (6th Cir. 1986) (and cases cited therein). This

Taylor's belated assertion that his claim was improperly denied under the DOL rule is also incorrect. The ALJ found rebuttal in Taylor's case under the second method in light of uncontradicted proof that Taylor suffered no pulmonary disability preventing him from working. App. 38a. At the time of the ALJ's decision, the finding would have been affirmed in all circuits. Later, several courts of appeals held that this type of proof most properly supported rebuttal under the third method, 20 C.F.R. § 727.203(b)(3). *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162-63 & n.5 (3d Cir. 1986) (affirming the Benefits Review Board's finding of (b)(2) rebuttal under (b)(3) and noting: "Any dispute over rebuttal labels is of no consequence . . . ."); *Wright v. Island Creek Coal Co.*, 824 F.2d 505, 508 (6th Cir. 1987); *Adkins v. U.S. Dep't of Labor*, 824 F.2d 287, 290-91 (4th Cir. 1987).

The Seventh Circuit has not definitely determined whether the absence of pulmonary disability is properly deemed (b)(2) or (b)(3) rebuttal proof. *Wetherill v. Director, Office of Workers' Compensation Programs*, 812 F.2d 376, 379-80 (7th Cir. 1987). The Tenth Circuit has sustained (b)(2) rebuttal on such

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Court will not consider issues not presented to the court of appeals, absent exceptional circumstances. *See, e.g., E.E.O.C. v. Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986). The theory presented by Taylor in response to the petition for certiorari was not presented administratively or in the court of appeals. There are no circumstances present here justifying a departure from the general rules of waiver. Moreover, the consideration of the matter for the first time in this Court is extremely prejudicial to Peabody, which did not present certain theories in its favor because Taylor's concession of ineligibility under the DOL rule made it unnecessary to do so. *See* Brief for the Federal Respondent at 10 n.3.

proof where the claimant failed to challenge the legal standard applied by the ALJ. *Mitchelson v. Director, Office of Workers' Compensation Programs*, 880 F.2d 265, 269 (10th Cir. 1989).

There is, in fact, no circuit in which Taylor's lack of any pulmonary disability would be considered irrelevant proof, and no circuit in which this proof could not, as a matter of law, rebut DOL's presumption. Rebuttal labels are mostly a matter of preference for the courts of appeals and are applied depending upon the facts of the case and its administrative disposition. *See, e.g., Neace v. Director, Office of Workers' Compensation Programs*, 867 F.2d 264, 269 (6th Cir. 1989) (sustaining (b)(2) rebuttal where the claimant alleged that his disability stemmed only from pulmonary disease). Taylor's argument that certiorari must be denied because he is entitled, as a matter of law, to benefits under the DOL presumption is not supported.[3]

---

[3] Ancillary to Taylor's mischaracterization of the positions of the courts of appeals is a statutory theory suggesting that benefits must be paid under the DOL or SSA presumption unless the employer actually identifies a job that the miner is able to perform and that is available to him where he lives. Brief of Respondent Hubert Taylor in Opposition at 23-25. The courts of appeals have rejected the proposition that black lung benefits are payable on account of a miner's retirement, unemployment, or non-occupationally related disability. *See, e.g., Mitchelson*, 880 F.2d at 270 ("We are not here concerned with whether claimant is eligible for some form of social security benefits."); *Director, Office of Workers' Compensation Programs v. Beatrice Pocahontas Co.*, 698 F.2d 680, 683 (4th Cir. 1983) ("The Act provides benefits for medical disability and is not a form of unemployment insurance."); *Meyer v. Zeigler Coal Co.*, 894 F.2d 902, 909 (7th Cir. 1990), *petition for cert. pending*, No. 89-7383 (filed Apr. 27, 1990) ("[T]he Act does not compensate disability due to age.").

II.

The Government agrees that the court below erred and that review is warranted, but prefers that this Court grant plenary review in one or two other related cases first, namely *Pauley v. BethEnergy Mines, Inc.*, No. 89-1714, or *Consolidation Coal Co. v. Director, Office of Workers' Compensation Programs*, No. 90-114. The Government's choice is based on the belief that the "(b)(2)" issue presents "unnecessary complications," and in light of the unreported death of Hubert Taylor during the pendency of his 1987 petition for certiorari.[4] Hubert Taylor, in the alternative, agrees that the Court should grant review of the "(b)(2)" question and disputes the Government's contention that a resolution of the (b)(2) question is less pressing or more difficult than a resolution of the (b)(3) and (b)(4) questions presented in the other pending cases. Taylor's estate also asks the Court to grant its motion to substitute.[5]

---

[4] *Pauley* presents a similar jurisdictional concern. Taylor's estate has sought to cure the failure to effect timely substitution by filing a motion to substitute which is now pending with this Court. Pauley has sought to avoid abatement by obtaining a *nunc pro tunc* order of substitution from the Benefits Review Board. Supplemental Brief for the Federal Respondent in No. 89-1714. There is some question whether the Benefits Review Board has jurisdiction to act *nunc pro tunc*. *See* 33 U.S.C. § 921(c).

[5] Peabody filed a Memorandum in response to Taylor's Motion to Substitute suggesting that the substitution is either statutory and automatic, or that it is appropriately accomplished *nunc pro tunc*. Peabody waives objections to abatement not only because the issues presented here are in critical need of resolution, but also because, as a practical matter, Taylor's estate may be able to avoid the effect of abatement by seeking a modification and

The petitioners here together with the mine operators involved in Nos. 89-1714, 90-113 and 90-114 have jointly filed a motion to consolidate all of the pending petitions seeking this Court's guidance in the resolution of all perceived tensions between the SSA and DOL rules. The movants for consolidation reject the Government's piecemeal approach for reasons stated in the motion.[6]

The Government is correct in suggesting that a comprehensive solution adds a complication, but the complication is neither unnecessary nor is it particularly complicated. The court below held: "Because the Labor rebuttal rules allow the consideration of medical evidence on rebuttal, while the HEW rebuttal rules do not, the former clearly are [invalid]." App. 9a. While the Government is again correct in suggesting that the holding sweeps more broadly than was necessary, it is, nevertheless, the holding this Court is being asked to review, and not DOL's narrowing of it within the confines of (b)(2). It is simple enough to test the holding and the regulation it invalidates against the mandate of the statute. The Third Circuit and Fourth Circuit cases do not necessarily provoke identical inquiries, and their resolution will not necessarily ascertain the rules that will apply for black lung litigants within the Seventh Circuit. A comprehensive solution is preferable, and it is necessary.

---

readjudication by DOL under 33 U.S.C. § 922, *incorporated by reference into* 30 U.S.C. § 932(a). *See also O'Keeffe v. Aerojet Gen. Shipyards, Inc.*, 404 U.S. 254 (1971).

[6] The Government has undertaken to serve its pleadings on all parties in the four cases, and this Reply will also be served on all the parties.

CONCLUSION

The petition for a writ of certiorari and the motion to consolidate this petition with Nos. 89-1714, 90-113, and 90-114 should be granted.

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Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF OF RESPONDENT HUBERT C. TAYLOR IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, regardless of the correctness of the court of appeals' analysis concerning the validity and scope of the rebuttal provisions of the Department of Labor ("DOL") interim regulation at 20 C.F.R. § 727.203, the record nonetheless entitles Taylor to an award of such benefits even under the existing judicial interpretations of those provisions that are least favorable to claimants?

2. Whether the rebuttal provision at § 727.203(b)(2) violates Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f), if construed to permit the opponent of a claim to rebut the presumption of disability solely by medical evidence showing that the miner is physically able to do his usual coal mine work, without any inquiry as to whether jobs entailing such work are available to him?

3. Whether the rebuttal provisions of the DOL interim regulation at 20 C.F.R. §§ 727.203(b)(3) and (b)(4) violate the "not...more restrictive" mandate of Section 402(f)(2) of the Act when applied to claimants who meet the invocation requirements of the HEW interim provision at 20 C.F.R. § 410.490?

4. Whether Section 402(f)(2) of the Act violates the Due Process Clause of the Fifth Amendment to the United States Constitution if construed to prohibit employers from defeating black lung benefit claims by application of any rebuttal provisions in the DOL interim regulation that are "more restrictive" than "criteria" in the HEW interim provision?

PARTIES TO THE PROCEEDING

Hubert Taylor was a claimant for disability benefits under the Act. In the Seventh Circuit below he was the petitioner. In this Court, he is the respondent named in the Petition for a Writ of Certiorari. Because Taylor died, however, Charles Martin ("Martin"), Personal Representative of Taylor's estate, has filed a Motion to Substitute, requesting that he be substituted for Mr. Taylor as the named respondent here. If the Motion To Substitute is granted, Martin will be the named individual respondent in this Court.

The Director, Office of Workers' Compensation Programs (the "Director"), who was a respondent in the Seventh Circuit below, is also a respondent here. See Sup. Ct. R. 12.4.

As set forth more fully in the Petition for a Writ of Certiorari, the petitioners here (who were respondents in the Seventh Circuit below) are the Peabody Coal Company and the Old Republic Insurance Company ("Peabody").

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
STATEMENT	1
A. The Black Lung Benefits Act And The Interim Presumptions	1
B. This Case	3
REASONS WHY THE COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI	8
A. The Court Should Deny The Petition Here In Its Entirety Because The Judgment Of The Seventh Circuit Is Correct Without Regard To Either Question That The Petition Raises	9
B. If The Court Does Not Deny The Petition Here In Its Entirety, And Grants Review Of The Question Involving The DOL Rebuttal Provisions At 20 C.F.R. §§ 727.203(b)(3) And (b)(4) In One Of The Pending Cases Presenting That Question, Then The Court Should Grant Review Here Of A Narrower Statutory Question Than The Petition Raises, One Involving The DOL Rebuttal Provision At 20 C.F.R. § 727.203(b)(2)	13
CONCLUSION	28

TABLE OF AUTHORITIES

Cases:	Page(s)
Acheson v. Furusho, 212 F.2d 284 (9th Cir. 1954)..	20
Adams v. Peabody Coal Co., 816 F.2d 1116 (6th Cir. 1987).....	16,17
Anderson v. Yungkau, 329 U.S. 482 (1947).....	19,20, 21
Bartley v. L & M Coal Co., 901 F. 2d 1311 6th Cir 1990)	16,17
Bethenergy Mines, Inc. v. Director, O.W.C.P., 890 F.2d 1295 (3d Cir. 1989), petition for cert. filed sub nom. Pauley v. Bethenergy Mines, Inc., 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714).....	27,28
Blankenship v. Beatrice Pocahontas Co., 3 BLR 1-773 (1981), aff'd sub nom. Director, O.W.C.P. v. Beatrice Pocahontas Co., 698 F.2d 680 (4th Cir. 1983).....	12,14, 25,26
Bowen v. City of New York, 476 U.S. 467 (1986)....	21
Cohens v. Virginia, 19 U.S. (6 Wheat) 264 (1821)..	27
Crider v. Island Creek Coal Co., 723 F.2d 908 (Table) (6th Cir. 1983).....	26
Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-114).....	28
Haywood v. Secretary of Health and Human Services, 699 F.2d 277 (6th Cir. 1983).....	3,4,14, 23
Martin v. Alabama By-Products Corp., 864 F.2d 1555 (11th Cir. 1989).....	11
Meyer v. Zeigler Coal Co., 894 F.2d 902 (7th Cir. 1990), petition for cert. filed, ____ U.S.L.W. ____ (U.S. Apr. 27, 1990) (No. 89-7383).....	27
Oravitz v. Director, O.W.C.P., 843 F.2d 738, (3rd Cir. 1988).....	11

Page(s)

Peabody Coal Co. v. Shonk, 906 F.2d 264 (7th Cir. 1990)..... 11,17

Pittston Coal Group v. Sebben, _____ U.S. _____, 109 S. Ct. 414 (1988)..... 2,5,22

Ramey v. Kentland Elkhorn Coal Corp., 755 F.2d 485 (6th Cir. 1985)..... 11,14, 16,17, 25,26

Salfi v. Weinberger, 422 U.S. 749 (1975) 20

Snyder v. Buck, 340 U.S. 15 (1950)..... 18,19

Strike v. Director, O.W.C.P., 817 F.2d 395 (7th Cir. 1987)..... 5

Sykes v. Itmann Coal Co., 2 BLR 1-1089 (1980), rev'd sub nom. Sykes v. Director, O.W.C.P., 812 F.2d 890 (4th Cir. 1987)..... 10,11, 12

Taft v. Alabama By-Products Corp., 733 F.2d 1518 (11th Cir. 1984)..... 11,14, 25,26

United States v. Crawley, 837 F.2d 291 (7th Cir. 1988)..... 27

York v. Benefits Review Board, 819 F.2d 134 (6th Cir. 1987)..... 11

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1985)..... 20

Statutes:

Black Lung Benefits Act, 30 U.S.C. §§ 901 et seq. (1982 and Supp. V 1987) 1

30 U.S.C. § 902(b)..... 2
30 U.S.C. § 902(f)(1)(A)..... 6,24
30 U.S.C. § 902(f)(2)..... 2,27
30 U.S.C. § 923(b)..... 20
30 U.S.C. § 932(a)..... 5

Black Lung Benefits Act of 1972, Pub. L. Pub. L. No. 92-303, § 4(a), 86 Stat. 153 24

	Page(s)
Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978).....	2
Judiciary Act of 1925, § 11(a), 43 Stat. 941, 28 U.S.C. § 780 (1946)	19,20
28 U.S.C. § 1254(1) (1964).....	5,8
28 U.S.C. Fed. R. Civ. P. 25(a)(1) (1946).....	20
28 U.S.C. Sup. Ct. R. 12.4 (1990).....	ii
28 U.S.C. Sup. Ct. R. 35.1 (1990).....	18,19, 20,21
28 U.S.C. Sup. Ct. R. 40.1 (1984).....	18,19
33 U.S.C. § 921(c) (1986).....	5
42 U.S.C. § 404(d) (1974)	20
42 U.S.C. § 405(g) (1974)	20
Regulations:	
20 C.F.R. (1989).....	1
Part 410 (Subpt. D)	
§ 410.412(a).....	23
§ 410.412(a)(1).....	6,23, 24,25, 26
§ 410.490.....	1,2,4, 5,23,25
§ 410.490(a)(1).....	25
§ 410.490(b).....	4
§ 410.490(c).....	4
§ 410.490(c)(1).....	6
§ 410.490(c)(2).....	Passim
Part 718	
§ 718.204(b)(1).....	15,16

Page(s)

Part 725

§ 725.545(c) 20

Part 727

§ 727.203..... 1,2
§ 727.203(a)(1)..... 4
§ 727.203(b) 7
§ 727.203(b)(1)..... 1,4,8, 9,10
§ 727.203(b)(2)..... Passim
§ 727.203(b)(3)..... Passim
§ 727.203(b)(4)..... Passim

Legislative History:

H.R. Rep. No. 1048, 92d Cong., 2d Sess. (1972).... 25

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BRIEF IN OPPOSITION TO A
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT

A. The Black Lung Benefits Act And The Interim Presumptions

Under the Black Lung Benefits Act, 30 U.S.C. §§ 901 et seq. (1982 and Supp. V 1987) (the "Act"), and implementing regulations, [1] coal miners who are or are presumed to be totally

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[1] The two principal regulatory provisions here are 20 C.F.R. § 410.490 and 20 C.F.R. § 727.203. We often refer to them by their popular names: the "HEW interim presumption" or the "HEW interim provision" (§ 410.490) and the "DOL interim presumption" or the "DOL interim regulation" (§ 727.203). We sometimes refer to the four "rebuttal provisions" of the DOL interim regulation (at §§ 727.203(b)(1)-(b)(4)) as the "§ (b)(1)," "§ (b)(2)," "§ (b)(3)," or "§ (b)(4)" rebuttal provisions. When we cite other regulatory provisions of 20 C.F.R. defining eligibility for black lung benefits, we usually omit the 20 C.F.R. reference. Except when we otherwise indicate, all citations to 20 C.F.R. are to the 1989 edition.

disabled due to "pneumoconiosis" [2] are entitled to the benefits the Act provides. Pittston Coal Group v. Sebben, _____ U.S. _____, 109 S. Ct. 414, 418 (1988).

The Sebben Court reviewed the legislative and regulatory history surrounding the adoption of the HEW interim provision at § 410.490 and the DOL interim regulation at § 727.203. 109 S. Ct. at 417-19. As relevant here, the Secretary of Labor adopted the DOL interim regulation in an effort to comply with Section 402(f)(2) of the Act, 30 U.S.C. 902(f)(2), added by the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, 92 Stat. 95 (1978). In Section 402(f)(2), Congress required the Secretary of Labor to develop and apply, to pending, newly filed, and some previously adjudicated claims, interim eligibility standards setting forth "criteria...not...more restrictive than the criteria applicable to a claim filed on June 30, 1973" (i.e., than the criteria applicable to a claim adjudicated under the HEW interim provision at § 410.490). See Sebben, 109 S. Ct. at 418.

In Sebben this Court held that one requirement for triggering, or invoking, the DOL interim presumption violates Section 402(f)(2). 109 S. Ct. at 419-23. However, the Sebben Court expressly declined to address the validity and scope of the rebuttal provisions of the DOL interim regulation. Id. at 423. These rebuttal provisions include two that are not found in the

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[2] The Act defines "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

HEW interim provision: § 727.203(b)(3), which permits rebuttal by proof that the miner's disability or death did not arise in whole or in part from coal mine employment, and § 727.203(b)(4), which permits rebuttal by proof that the miner does not or did not have pneumoconiosis. In addition, the Director currently interprets the DOL rebuttal provision at § 727.203(b)(2) to permit the opponent of a claim to rebut the DOL presumption solely by making a medical showing that the miner is physically able to do his usual coal mine work. In contrast, the similarly-worded HEW rebuttal provision at § 410.490(c)(2) has been interpreted to require not only such a medical showing but also an economic showing that the miner's usual coal mine work is available to him in the immediate area of his residence. Haywood v. Secretary of Health and Human Services, 699 F.2d 277 (6th Cir. 1983).

B. This Case.

Hubert Taylor was a coal miner. Ap. 31a. He worked in the mines for 42 years, from 1934 to 1976, in a variety of jobs. Id. The last job that he performed over a substantial period of time was that of "ramp operator." Id.

Taylor filed a claim for benefits under Part C of the Act on June 6, 1977. Ap. 29a. The Director approved the claim, but the responsible operator, Peabody Coal Company ("Peabody"), appealed, and a hearing before an Administrative Law Judge ("ALJ") was held. Ap. 30a. Based on Taylor's 42 years of coal mine work and nine x-ray readings of his lungs that were positive for

pneumoconiosis, the ALJ found that Taylor successfully invoked the presumption at § 727.203(a)(1) that he was totally disabled due to pneumoconiosis. Ap. 36a. The ALJ also found that the presumption was not rebutted under § 727.203(b)(1), § 727.203(b)(3), or § 727.203(b)(4). Ap. 37a-38a. However, the ALJ concluded that the presumption was rebutted under § 727.203(b)(2) by medical evidence that, "from a pulmonary standpoint," Taylor could perform his "usual coal mine employment." Ap. 38a. Section 727.203(b)(2) provides for rebuttal if "it is established that the individual is able to do his usual coal mine work or comparable and gainful work."

The ALJ then proceeded to adjudicate Taylor's claim under the HEW interim provision at § 410.490. Finding that Taylor invoked that presumption under § 410.490(b), the ALJ concluded that Peabody had not rebutted the presumption under either of the rebuttal provisions at § 410.490(c). Ap. 39a. The ALJ ruled that the rebuttal provision at § 410.490(c)(2), in contrast to its companion provision in the DOL regulation at § 727.203(b)(2), requires the opponent of a claim to show that the miner is not "vocationally disabled" -- i.e., that the miner's usual coal mine work is available in the immediate area of his residence. Ap. 39a (citing Haywood v. Secretary of Human Services, 699 F.2d 277 (6th Cir. 1983)). Because the record lacked any evidence rebutting Taylor's claim under that standard, the ALJ determined that he was entitled to benefits under § 410.490. Ap. 39a.

Peabody appealed to the Benefits Review Board, which

reversed the ALJ's award of benefits. Ap. 25a-27a.

Pursuant to 33 U.S.C. § 921(c) (as incorporated by 30 U.S.C. § 932(a)), Taylor appealed to the Seventh Circuit, which initially affirmed the Board's decision. Ap. 19a-22a ("Taylor I"). Citing its then recent decision in Strike v. Director, O.W.C.P., 817 F.2d 395 (7th Cir. 1987), the Seventh Circuit agreed with the Board that the ALJ should not have applied the HEW interim provision at § 410.490 to Taylor's claim. Ap. at 21a-22a.

Taylor sought review of the Seventh Circuit's decision in this Court pursuant to 28 U.S.C. § 1254(1) (1964). Ap. 23a. On December 12, 1988, this Court granted Taylor's writ of certiorari, vacated the Seventh Circuit's decision, and remanded the case to that court for "further consideration in light of" its recent ruling in Sebben. Id.

On remand, the Seventh Circuit reversed the Board's decision and reinstated the ALJ's award of benefits to Taylor. Ap. 3a-14a ("Taylor II"). In the court's view, Sebben established that Section 402(f)(2) of the Act was meant to prohibit the Secretary of Labor from imposing on Section 402(f)(2) claimants any more restrictive criteria, whether "evidentiary" or "adjudicatory," than those found in the HEW interim provision, including criteria "applied...on rebuttal." Ap. 11a. Focusing on § 727.203(b)(2), the DOL rebuttal provision that the Board had applied in overturning Taylor's award, the court held that reading the DOL interim regulation to permit rebuttal by "medical evidence

[alone]" would violate Section 402(f)(2) of the Act. Ap. 9a-11a. This was because § 727.203(b)(2)'s companion HEW rebuttal provision, in addition to requiring a medical showing that the miner is able to do his usual coal mine work, also requires a non-medical showing of such ability, Ap. 1a-2a (denying petitions for rehearing), Ap. 9a-11a, [3] apparently a showing that jobs demanding such work are actually available in the immediate area of the miner's residence. 30 U.S.C. § 902(f)(1)(A); 20 C.F.R. § 410.412(a)(1).

Neither the ALJ, the Board, nor the panel in Taylor I ever suggested that Peabody might be able to rebut the DOL interim presumption under any rebuttal provision other than § 727.203(b)(2). Ap. 18a-22a, 25a-27a, 29a-40a. Nor did Peabody or the Director even argue to the court of appeals that Peabody

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[3] According to Peabody, the court of appeals erred by construing Section 402(f)(2) to make medical evidence non-probative under the DOL interim regulation. Pet. at 8-14. Respondent Taylor agrees that such a construction of Section 402(f)(2) would be erroneous. However, the court of appeals' order denying rehearing emphatically rebuffs any notion that Peabody has read the court correctly. In their petitions for rehearing, both Peabody and the Director argued that the court of appeals wrongly construed the HEW rebuttal provisions at §§ 410.490(c)(1) and (c)(2) to "foreclose the use of medical rebuttal evidence" and that such construction, under the "not...more restrictive" mandate of Section 402(f)(2), carried with it the incorrect holding that medical rebuttal evidence was entirely foreclosed under the DOL interim regulation as well. Ap. 1a. But the court's order denying rehearing explained that Peabody and the Director had read the court's opinion incorrectly: "[W]e note that the precise extent to which the HEW regulations allowed rebuttal was not at issue in this case. We held that to the extent the Department of Labor regulations allow rebuttal--when HEW's do not--the Labor rules are invalid. We did not hold that there are no conceivable circumstances under which HEW rules might allow medical rebuttal." Ap. 2a.

might be able to rebut the presumption under any rebuttal provision except § (b)(2). [4] Nonetheless, the court also elected to discuss the third and fourth DOL rebuttal provisions at §§ (b)(3) and (b)(4). According to the court, because §§ (b)(3) and (b)(4) lack parallels under the HEW interim provision, they run afoul of the "not...more restrictive" mandate of Section 402(f)(2). Ap. 11a. The court also expressed its view that striking §§ (b)(3) and (b)(4) from § 727.203(b) would not violate the due process rights of employers like Peabody. A. 11a-13a.

Peabody and the Director both filed petitions for rehearing or rehearing en banc, challenging, inter alia, the court of appeals' holding with respect to the types of evidence that are relevant for rebuttal under § 727.203(b)(2). Peabody Pet. for Rehearing at 6-7 (No. 86-2590); Dir. Pet. for Rehearing at 8-11 (No. 86-2590). According to the Director, the court of appeals erred in holding that rebuttal under the "usual coal mine work" clause of § 727.203(b)(2) must be based on vocational as well as medical evidence. Dir. Pet. for Rehearing at 8-11 (No. 86-2590). On February 1, 1990, the court denied both petitions. Ap. 1a-2a.

Peabody filed a timely petition for certiorari, invoking

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[4] In a footnote to its brief in Taylor I, Peabody correctly observed that § (b)(3) sets forth the requirement that a claimant's disability must be attributable, at least in part, to pneumoconiosis. Brief for Respondents at 10 and n.5, Taylor v. Peabody Coal Co., 892 F.2d 503 (7th Cir. 1989) (No. 86-2590). (citing cases). But Peabody never contended that it could establish rebuttal under that subsection; and indeed it could not. See p.9 infra.

this Court's jurisdiction under 28 U.S.C. § 1254(1) (1964).

REASONS WHY THE COURT SHOULD DENY THE PETITION FOR A WRIT OF CERTIORARI

The petition Peabody filed here should be denied because the judgment below is correct without regard to either question that the petition presents. See Section A infra. Peabody's petition presents two questions, a statutory one and a constitutional one. Peabody claims that a circuit conflict exists with respect to the statutory question, which involves the validity and scope of the rebuttal provisions of the DOL interim regulation (§§ 727.203(b)(1)-(b)(4)). Pet. at 8-14. The Director is more precise, correctly pointing out that the DOL interim regulation's rebuttal provisions are the subject of two separate circuit conflicts, one involving the scope of § 727.203(b)(2) ("the § (b)(2) issue") and the other involving the validity of §§ 727.203(b)(3) and (b)(4) ("the §§ (b)(3)/(b)(4) issue"). Dir. Op. Cert. Br. at 6-7, 9-11. No circuit conflict exists with respect to the constitutional question, Pet. at i, [5] a question that, in any event, would not arise unless this Court granted review of the §§ (b)(3)/(b)(4) issue and then resolved that issue against the coal companies.

However, if this Court does not deny the petition in its entirety, and grants review of the §§ (b)(3)/(b)(4) issue in one of the pending cases presenting that issue, then the Court should

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[5] Indeed, the court below is the only court to have passed on the constitutional question that Peabody presents for review or any related constitutional question.

grant review here of the § (b)(2) issue, a narrower statutory issue than the petition raises. See Section B infra. Granting review of the § (b)(2) issue here would make review of the DOL rebuttal provisions complete if the Court also grants review of the separate §§ (b)(3)/(b)(4) issue in one of the pending cases.

A. The Court Should Deny The Petition Here In Its Entirety Because The Judgment Of The Seventh Circuit Is Correct Without Regard To Either Question That The Petition Raises

The facts of Hubert Taylor's claim entitle him to benefits even when all four rebuttal provisions of the DOL interim regulation are applied to his claim and are given the constructions that are the least favorable to claimants that the courts have adopted. Consequently, even if this Court were to overturn the decision below, Taylor would still prevail on his claim for black lung benefits. The judgment of the Seventh Circuit is correct without regard to the statutory question Peabody has framed or to the related constitutional question Peabody also presents. Thus, this case is not a suitable vehicle for resolving either of these questions.

The ALJ found that the evidence in this case does not rebut the DOL interim presumption under three of its four rebuttal provisions: §§ (b)(1), (b)(3), and (b)(4). Ap. 37a-38a. And neither Peabody nor the Director suggested in the court below that the ALJ erred with respect to any of these findings. Indeed, the Director now concedes the correctness of the ALJ's findings with respect to §§ (b)(3) and (b)(4). Dir. Op. Cert.

Br. at 10 n.3. [6]

The remaining DOL rebuttal provision, § (b)(2), provides for rebuttal if "in light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work." § 727.203(b)(2). The ALJ in fact found that Peabody did establish rebuttal under the "usual coal mine work" clause of this provision based on a non-examining physician's statement that, "from a pulmonary standpoint, the Claimant could perform his usual coal mine employment." Ap. 38a (emphasis added). The ALJ relied on the then prevailing interpretation of that provision that the Benefits Review Board had set forth in Sykes v. Itmann Coal Co., 2 BLR 1-1089 (1980). Ap. 37a-38a (citing Sykes). In Sykes the Board had held that § (b)(2) rebuttal could be established by a showing that the miner did not have any respiratory or pulmonary impairments that were, by themselves, totally disabling.

Regardless of whether the rationale of the court below is correct, [7] the court's conclusion that the ALJ erred in finding rebuttal under § (b)(2) is surely correct. The Board's Sykes standard on which the ALJ relied has been completely discredited,

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[6] Peabody cannot rebut under § (b)(1) either. That provision provides for rebuttal if the opponent of the claim can show that the "individual is, in fact, doing his usual coal mine work or comparable and gainful work." Taylor last worked in 1976, Ap. 31a, eight years before his administrative hearing. Ap. 29a.

[7] Respondent Taylor agrees with the court's holding in his case that § (b)(2) rebuttal does not entail a purely medical inquiry. See pp. 22-25 infra.

rejected by every court of appeals to have considered it.[8] Rather, the approved test that the courts have unanimously adopted is simply whether or not the miner is able to engage in his usual coal mine work; the question of causation (i.e., whether the miner's disability was solely the result of respiratory and/or pulmonary impairments) is irrelevant. See cases cited in n.8 supra. Thus, as the Director himself has conceded here, the ALJ applied the wrong test in finding the DOL presumption rebutted under § (b)(2). Dir. Op. Cert. Br. at 12 n.5.

The record unequivocally establishes that Taylor prevails even under the judicial reading of that approved test that favors claimants the least--that § (b)(2) entails a purely medical inquiry and not also an inquiry into whether a claimant's usual coal mine work is actually available to him. Ramey v. Kentland Elkhorn Coal Corp., 755 F.2d 485 (6th Cir. 1985); Taft v. Alabama By-Products Corp., 733 F.2d 1518 (11th Cir. 1984); Director,

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[8] The Board's decision in Sykes was itself ultimately reversed in Sykes v. Director, O.W.C.P., 812 F.2d 890 (4th Cir. 1987). The words of § 727.203(b)(2) do not limit the inquiry under this subsection to whether respiratory or pulmonary impairments, rather than other types of impairment, disable the miners. The Fourth Circuit stated: "[the idea that a] causation requirement may be imported into § 727.203(b)(2)...is belied by the words of the regulation. Thus, Section 727.203(b)(2) is concerned with the question of whether miners are totally disabled for whatever reason. There is no inquiry into causation in a proper § 727.203(b)(2) rebuttal." Id. at 893-894. Following Sykes, every court of appeals to consider the question has agreed. Peabody Coal Co. v. Shonk, 906 F.2d 264 (7th Cir. 1990); Martin v. Alabama By-Products Corp., 864 F.2d 1555, 1557 (11th Cir. 1989); Oravitz v. Director, O.W.C.P., 843 F.2d 738, 740 (3rd Cir. 1988); York v. Benefits Review Board, 819 F.2d 134, 138 (6th Cir. 1987).

O.W.C.P. v. Beatrice Pochahontas Co., 698 F.2d 680 (4th Cir. 1983). The record does not include a single report or testimony by any physician that Mr. Taylor was physically able to do his usual coal mine work. Ap. 31a-39a. [9] Accordingly, Taylor should prevail under § (b)(2) even if this Court ultimately determines that the § (b)(2) rebuttal test entails a purely medical inquiry so that the opponent of a claim need not also make an economic showing that jobs requiring a miner's usual coal mine work are actually available to him.

Peabody seeks review here based on the contention that the court of appeals wrongly, and in conflict with other circuits, invalidated the third and fourth rebuttal provisions of the DOL interim regulation (§§ (b)(3) and (b)(4)) and interpreted the second rebuttal provision (§ (b)(2)) too favorably for claimants. However, we have pointed out that Peabody could not establish rebuttal under any of these provisions even if all of them were applied to Taylor's case and even if § (b)(2) were given the existing judicial interpretation that is least favorable to claimants. Thus, if this Court were to grant review in this case to resolve either of the existing conflicts among the circuits, see Section B infra, the Court would not need to reach the points of the alleged conflicts. Accordingly, this Court should deny

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[9] One non-examining physician, based on his review of Taylor's hospital record and medical tests, testified that Taylor "could perform his job from a pulmonary standpoint." Ap. 34a (emphasis added). The ALJ relied on this statement to find § (b)(2) rebuttal under the now discredited standard that the Board adopted in Sykes.

the writ of certiorari outright.

B. If The Court Does Not Deny The Petition Here In Its Entirety, And Grants Review Of The Question Involving The DOL Rebuttal Provisions At 20 C.F.R. §§ 727.203(b)(3) And (b)(4) In One Of The Pending Cases Presenting That Question, Then The Court Should Grant Review Here Of A Narrower Statutory Question Than The Petition Raises, One Involving The DOL Rebuttal Provision At 20 C.F.R. § 727.203(b)(2)

1. The § (b)(2) Issue. While several other pending cases are potential vehicles for resolving both the constitutional question that Peabody raises and the circuit conflict concerning the DOL rebuttal provisions at §§ 727.230(b)(3) and (b)(4), see Dir. Op. Cert. Br. at 6-7, none of them is a vehicle for resolving the separate circuit conflict concerning the DOL rebuttal provision at § 727.203(b)(2). Indeed, none of them even addressed any issue concerning the validity or the scope of § (b)(2).

This case does present the question whether rebuttal under the "usual coal mine work" clause of § (b)(2) requires a job-availability inquiry. A conflict among the circuits as to this question exists; but to our knowledge, this is the only case pending before the Court that presents the question. We have urged the Court to deny the petition here in its entirety. See Section A supra. However, if the Court were to reject that request, the question here would become whether the § (b)(2) rebuttal question merits plenary review. [10] We submit that it

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[10] For the reasons stated by the Director in his response here, Dir. Op. Cert. Br. at 12, the § (b)(2) question does not carry with it any related constitutional question.

would, at least if the Court grants review of the §§ (b)(3)/(b)(4) issue in one of the cases presenting that issue. [11]

a. The conflict among the circuits involving § (b)(2) is clear. The court of appeals below held that the § (b)(2) rebuttal provision, if read to entail solely a medical inquiry concerning whether a miner is physically able to do his usual coal mine work, violates Section 402(f)(2) of the Act. Ap. 8a-11a, Ap. 1a-2a (denying petition for rehearing). See also n.6, supra; Haywood v. Secretary of Health and Human Services, 699 F.2d 277 (6th Cir. 1983) (rebuttal under "usual coal mine work" clause of § 410.490(c)(2) requires proof that such work is actually available). In contrast, three other circuits have held that Section 402(f)(2) of the Act allows the Secretary to require solely a medical inquiry under § (b)(2) and does not direct the Secretary to require the claimant's opponent to make any economic or other non-medical showing in order to rebut the presumption under the "usual coal mine work" clause of § (b)(2). Ramey, 755 F.2d at 490; Taft, 733 F.2d at 1521-22; Beatrice Pocahontas, 698 F.2d at 682.

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[11] We recognize that it is unusual for a party to request this Court to review a question on which he has prevailed in the court of appeals, as Respondent Taylor has done here. However, we emphasize that we are, in the first instance, requesting this Court to deny Peabody's petition in its entirety and that we only request the Court to grant review of the § (b)(2) issue in this case if the Court declines to deny Peabody's petition. We base this subsidiary request on our best assessment that it is the course most likely to lead to the ultimate resolution of this case in favor of Taylor's estate.

b. Several factors make the § (b)(2) issue an important one. First, the circuit conflict obviously creates substantial administrative inequities in the administration of the black lung benefits program. Moreover, tens, and perhaps hundreds, of millions of dollars are at stake in this Court's authoritative resolution of the § (b)(2) rebuttal issue. Tens of millions are at stake merely in pending cases governed by the DOL interim regulation. [12] In addition, this Court's resolution of the types of inquiry pertinent to rebuttal under the "usual coal mine work" clause of § (b)(2) would likely also inform, and perhaps be decisive of, the judicial interpretation of the identical phrase in 20 C.F.R. § 718.204(b)(1), one of the provisions of the DOL permanent regulations that govern eligibility for all claims filed on or after April 1, 1980. The DOL permanent regulations govern far more claims than the DOL interim regulation does.

c. Presumably, Peabody believes that this Court should grant review of the § (b)(2) issue in this case since the statutory question Peabody presents for review in its petition encompasses all of the rebuttal provisions of the DOL regulation, including § (b)(2). However, the Director has stated his view that granting review of the § (b)(2) issue in this case is "not...necessary." Dir. Op. Cert. Br. at 13. The Director sets

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[12] We estimate that between 500 and 1,000 claims governed by the DOL interim regulation would be affected by this Court's resolution of the § (b)(2) rebuttal issue, putting at issue between $60 million and $120 million. See Dir. Op. Cert. Br. at 9 and n.2 (estimating present value of a single black lung claim at between $118,318 and $185,656).

forth several reasons for this view, none of which is persuasive.

First, the Director asserts that the § (b)(2) rebuttal method is "not as important" as the §§ (b)(3) and (b)(4) methods because §§ (b)(3) and (b)(4) "allow a broader range of rebuttal." Id. However, the estimated $60 million to $120 million at stake in § (b)(2) cases alone certainly appears to be "important" enough to deserve this Court's review. Moreover, the Director's assertion fails to take into account the potential impact that an authoritative resolution of the § (b)(2) issue could have on claims governed by the DOL permanent regulations, all of which must satisfy the "usual coal mine work" clause that § 718.204(b)(1) also includes.

In addition, the Director asserts that "[p]arties contesting eligibility do not frequently succeed under" § (b)(2) and that §§ (b)(3) and (b)(4) "usually provide the only realistic possibilities of rebutting a presumption of entitlement." Id. As support for this assertion, however, the Director cites only a law review article, written by two attorneys who represent coal companies, that sets forth no authority whatever for the proposition. Indeed, at least one of the authors of the article has represented coal companies that, in several reported court of appeals cases alone, successfully defeated claims under the prevailing interpretation of § (b)(2). E.g., Bartley v. L & M Coal Co., 901 F.2d 1311 (6th Cir. 1990); Adams v. Peabody Coal Co., 816 F.2d 1116 (6th Cir. 1987); Ramey, 755 F.2d at 486-488

and nn.3, 7. [13] His experience would appear to belie the unsupported assertion in his article and suggests, consistent with our experience, that many claims have been defeated under the present interpretation of § (b)(2). See also, e.g., Peabody Coal Co. v. Shonk, 906 F.2d 264 (7th Cir. 1990).

The Director also asserts that reviewing the § (b)(2) issue would likely entail "unnecessary complications" for the Court because the court below viewed rebuttal under the DOL interim regulation "broadly." Dir. Op. Cert. Br. at 13. However, the Director has chosen not to specify what the "unnecessary complications" might be. The decision below has not prevented the Director from ascertaining, and informing the other parties of, the precise contours of the § (b)(2) issue--in the Director's words, "whether a coal mine operator must present vocational evidence showing that a claimant can obtain coal mine work in order to rebut the presumption." Id. at 10. And nothing would appear to prevent the parties here from briefing adequately for the Court this well-defined legal issue.

Furthermore, in light of the Director's acknowledgement that this case "turns on" the § (b)(2) issue alone, id. at 8, his suggestion that the Court should hold this case while it reviews the separate §§ (b)(3)/(b)(4) issue in one of the other pending cases, id. at 14, is both anomalous and illogical. We are aware of no case in which any party has contended, much less in which

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[13] Mark E. Solomons, one of the authors of the the article, was counsel for the coal companies in Bartley, Adams, and Ramey, and is counsel of record for Peabody here as well.

any court has held, that § (b)(3) or § (b)(4) entails a vocational inquiry or any other non-medical inquiry. Thus, there is no reason to expect that this Court's resolution of the §§ (b)(3)/(b)(4) issue would undermine the lower court's conclusion that rebuttal under § (b)(2) entails a non-medical inquiry (presumably a vocational or economic inquiry), whether or not such rebuttal entails a medical inquiry as well.

d. In urging this Court not to grant plenary review of the § (b)(2) rebuttal issue, the Director also notes that respondent Hubert Taylor died on April 27, 1988 while his prior petition for a writ of certiorari was pending, but that William Martin, the representative of Mr. Taylor's estate, did not file a motion to substitute himself for Mr. Taylor until May 1990. Dir. Op. Cert. Br. at 13-14. Citing Snyder v. Buck, 340 U.S. 15, 21 (1950), the Director suggests--without making a directed argument to this effect--that this case may have abated under Sup. Ct. R. 35.1 (formerly Sup. Ct. R. 40.1), which provides that "[t]he substitution of a representative of the deceased***must be made within six months after the death of a party, or the case shall abate." [14] If the Court were to accept this suggestion, then presumably it would direct vacation of the court's judgment below. Such a result would defeat both Peabody's request that the Court grant its petition here and Taylor's (Martin's) request

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[14] This Court granted the prior petition for a writ of certiorari on December 12, 1988. Ap. 23a. Accordingly, the case was pending in this Court more than six months after Taylor's death without a substitution motion being filed.

that the Court deny the petition. See Section A supra.

When this case was before this Court in 1988, counsel for Taylor did not file a motion for substitution within the six-month period specified in former Sup. Ct. Rule 40.1 because he overlooked that rule. He apologizes to this Court for his oversight, which he sought to rectify by filing a substitution motion promptly after a repesentative of Taylor's estate was appointed. However, the Director's suggestion that this case should abate is completely without merit.

To begin with, Snyder is wholly inapposite here, both because it construes Section 11(a) of the Judiciary Act of 1925, 43 Stat. 941, 28 U.S.C. § 780 (1946) (governing substitutions for public officers ceasing to hold office), not Sup. Ct. R. 35.1 or any of its predecessors (governing substitutions for parties other than public officers), and because it is a mandamus case. [15] Much more enlightening is Anderson v. Yungkau, 329 U.S.

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[15] The plaintiff in Snyder sought a writ of mandamus to compel a federal official to pay her a widow's allowance. The official retired, and neither party moved to substitute the official's successor within the six-month period that the statute allowed for substitution. In holding that the action abated, the Court enforced the entirely reasonable congressional determination that, when no timely substitution is made for a retired federal official against whom mandamus is sought, then a court should conclude that the action is no longer necessary because the successor official must have been willing to discharge the duty that the retired official had allegedly refused to perform. However, the circumstances that prevail in this suit for statutory black lung benefits are quite different, since the Director has continued to defend both his decision to deny Taylor benefits and the challenged rules that animated that denial. Accordingly, any conclusion that the controversy between the parties here might no longer exist, would be entirely unreasonable. Similarly, unlike Snyder, here it would be unreasonable to presume that the estate no longer desires the

482 (1947). There, this Court addressed the two-year substitution period in former Fed. R. Civ. P. 25(a)(1), [16] which, like current Sup. Ct. R. 35.1, did govern substitutions for parties who were not public officers. And the Court construed the two-year period there as a statute of limitations. 329 U.S. at 485. [17] Significantly, reliance on statutes of limitations can be waived by parties, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 398 (1985), which is precisely what happened here. Peabody, the party who is liable for payment of Taylor's claim to benefits, has expressly waived any reliance on

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black lung benefits Taylor sought since the statutory and regulatory scheme here--42 U.S.C. § 404(d), incorporated by reference into 30 U.S.C. § 923(b); 20 C.F.R. § 725.545(c)--provides both that Taylor's claim for benefits survives him and designates the priority order of successor beneficiaries. See Acheson v. Furusho, 212 F.2d 284, 292 (9th Cir. 1954) (even when no timely motion to substitute has been made, abatement under former Sup. Ct. R. 19(4) and § 11(a) of the Judiciary Act of 1925 is appropriate only when it is reasonable to presume that continuation of the litigation would result in a judgment that "would not be effective").

[16] Former Fed. R. Civ. P. 25(a)(1) provided, in relevant part that:

> "If a party dies and the claim is not thereby extinguished, the court within 2 years after the death may order substitution of the proper parties. If substitution is not so made, the action shall be dismissed as to the deceased party."

[17] The text of Sup. Ct. R. 35.1 informs the conclusion that the specified six-month time period is a statute of limitations, since, under the circumstances described in the rule, it provides for an additional "designated time" beyond the six month period in which the substitution may be made. See 42 U.S.C. § 405(g) (requiring that a civil action be filed within sixty days of final administrative decision or such additional time as Secretary of HHS may permit); Salfi v. Weinberger, 422 U.S. 749, 763-64 (1975) (construing 60 day period in § 405(g) as a statute of limitations).

the six-month limitations period in Sup. Ct. R. 35.1. See Petitioners' Memorandum In Response To Motion To Substitute Party (urging that Martin's motion to substitute be granted nunc pro tunc as of the date of Taylor's death). We have found no case holding that, under the rules of this Court, a party's failure to make a timely substitution motion for a party who was not a public officer constituted abatement where the party in whose favor the abatement would have run has waived his timeliness (statute of limitations) objection.

Moreover, assuming that the six-month substitution period in Sup. Ct. R. 35.1 is a statute of limitations, as Anderson suggests it is, then its application must also be guided by "equitable" considerations. Bowen v. City of New York, 476 U.S. 467, 479 (1986). Such equitable considerations strongly counsel against abatement of this case, whether the result of abatement here would be "only" significant additional delay in the litigation of this case or the denial of benefits to Taylor and his estate, or both. Taylor's claim has already been pending for over 13 years, has been twice before the court of appeals, and is now before this Court for the second time. In addition, because Peabody has waived any reliance on the abatement rule--indeed, it has urged this Court to allow this litigation to proceed--the Court can disregard any injury that Peabody may incur because the action is allowed to continue in this Court. Moreover, the Director has effectively conceded that the facts of Taylor's claim would entitle him to the black lung benefits he

sought, see pp. 9,11 supra, and neither Taylor nor his estate has done anything to suggest that this Court should not honor Congress' intent that eligible claimants should receive black lung benefits. Both Peabody and Taylor are urging that this Court's decision finally resolve this case on its merits. Under these circumstances, they should be afforded such a decision, if at all possible.

e. Of the four circuits that have squarely addressed the § (b)(2) rebuttal issue in published opinions, only the court below has reached the correct conclusion. It relied on Section 402(f)(2) of the Act for its interpretation that § (b)(2) is not limited to a purely medical inquiry concerning a miner's ability to do his usual coal mine work. In Sebben, this Court held that, under Section 402(f)(2)'s "not...more restrictive" directive, the "criteria" the Secretary of Labor applies to Part C claims under the DOL regulation must be at least as favorable to the individual claimant as the "criteria" applicable to a claim filed on June 30, 1973 (e.g., under the HEW interim provision). Sebben, 109 S. Ct. at 420-22. Thus, the central issue here is the threshold question--whether the HEW rebuttal provision at § 410.490(c)(2), which parallels the rebuttal provision at § 727.203(b)(2), permits rebuttal solely by medical evidence establishing that a miner can physically do his usual coal mine work.

The only court of appeals that has squarely addressed this

question concerning § 410.490(c)(2) concluded that the party opposing the claim "cannot rebut the presumption of total disability [under § 410.490(c)(2)] unless he demonstrates that the claimant is not vocationally disabled in the immediate area around his home." Haywood, 699 F.2d at 285. In the Haywood court's view, HEW's separate regulation at § 410.412(a)(1) requires this conclusion. Id. [18] The court was correct. Section 410.412(a)(1) defines the "criteria" of § 410.490(c)(2), so that under Sebben principles it also defines the "criteria" that establish the "restrictivity" floor for criteria under § 727.203(b)(2). Section 410.412(a)(1) has this function because, being cross-referenced in § 410.490(c)(2), it expressly defines the phrase "usual coal mine work or comparable and gainful work" in § 410.490(c)(2). Section 410.412(a)(1) defines that phrase to include the requirement that such work be "gainful work in the immediate area of his [the miner's] residence." § 410.412(a)(1). Consequently, to establish that a claimant is able to do his "usual coal mine work" or other "comparable and gainful work,"

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[18] Section 410.412(a) provides:

> "[a] miner shall be considered totally disabled due to pneumoconiosis if: (1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time... ."

(emphasis added). This provision actually has statutory force and effect for all Part C claims because Section 402(f)(2) of the Act, through its "not...more restrictive" mandate, incorporated § 410.490, including its cross-references to § 410.412(a)(1).

the opponent must show at least that "gainful work" of both types exists "in the immediate area of his [the miner's] residence" as well as that the miner is physically able to do it.

Section 410.412(a)(1) implements Section 402(f)(1)(A) of the Act, which the 1972 amendments added to the statute. Pub. L. No. 92-303, § 4(a), 86 Stat. 153. Section 402(f)(1)(A) provides:

> [A] miner shall be considered totally disabled when any respiratory and pulmonary impairment or impairments resulting from employment in a mine or mines prevents him from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he has previously engaged with some regularity over a substantial period of time.

30 U.S.C. § 902(f)(1)(A). Like § 410.412(a)(1), its implementing regulation, Section 402(f)(1)(A) of the Act does not distinguish "usual coal mine work" from "comparable and gainful work." Rather, Section 402(f)(1)(A) sets forth but a single category of "qualifying" work, work that qualifies an otherwise eligible miner for benefits because he is unable to perform it. Thus, when § 410.490(c)(2) refers to a miner's "usual coal mine work or comparable and gainful work" and then cross-references § 410.412(a)(1) to define that term, the phrase "usual coal mine work," which nowhere appears either in § 410.412(a)(1) or in Section 402(f)(1)(A) of the Act, must be understood simply as one type of "comparable and gainful work."

The central point in this context is that Section 402(f)(1)(A) of the Act and § 410.412(a)(1) set forth a single category of qualifying work that must be "gainful"--i.e., offer an individual the opportunity to earn income. But work cannot

possibly meet this criterion unless it actually exists. And § 410.412(a)(1) adds the further requirement that such qualifying work must exist in the "immediate area of [the miner's] residence." Accordingly, when Section 402(f)(1)(A) of the Act and § 410.490(a)(1) are scrutinized, claims in which the miner invokes the § 410.490 presumption may not be denied solely by a medical showing that the claimant is physically able to do his "usual coal mine work" or other "comparable and gainful work" absent an accompanying economic showing that both types of work exist in the immediate area of his residence.

The legislative history of the 1972 amendments confirms this understanding of the "criteria" applicable both to Part B claims and, by virtue of the later amendment adding Section 402(f)(2) to the Act, to Part C claims. In particular, in the Conference Report accompanying the 1972 amendment to the statutory definition of "total disability", the conferees stated that a claimant should not be found to be totally disabled if he is "in fact engaging in substantial work involving skills and abilities comparable to those of any mine employment [he worked at regularly]...or if it is clearly demonstrated that he is capable of performing such work and such work is available to him in the immediate area of his residence." H.R. Rep. No. 1048, 92d Cong., 2d Sess. 7 (1972) (emphasis added). [19]

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19 The circuit court decisions holding, contrary to the court of appeals below, that rebuttal under the "usual coal mine work" clause of § (b)(2) only requires a medical showing--Ramey, Taft, and Beatrice Pocahontas--all ignore or slight § 410.412(a)(1), Section 402(f)(1) of the Act, and the legislative

In sum, if the Court does not deny Peabody's petition in its entirety, and grants review of the §§ (b)(3)/(b)(4) issue in one of the pending cases raising that issue, then the Court should grant review in this case of the § (b)(2) issue.

2. The §§ (b)(3)/(b)(4) Issue. The Director adequately describes the separate circuit conflict concerning the § (b)(3)/(b)(4) issue. Dir. Op. Cert. Br. at 6-7. Although the court below addressed the §§ (b)(3)/(b)(4) issue and the constitutional issue related to it, we submit that the court's conclusions with respect to those issues are merely dicta. [20]

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history. All of these cases were incorectly decided for several reasons, including those stated by Judge Jones in his separate opinion in Ramey, 755 F.2d at 493-99.

Ramey, Taft, and Beatrice Pocahontas also ignore or slight the fact that the Director's former position was that rebuttal under the "usual coal mine" work clause of § (b)(2) requires an economic showing. At least as early as 1981, the Director's position was that an opponent of a claim could not rebut under the "usual coal mine work" clause of § (b)(2) solely by showing that the miner was physically able to perform such work. The Director's position was that the opponent also had to show that such work was "available" to him, which, according to the Director, meant not only that such work existed "in the immediate area of his residence," § 410.412(a)(1), but also that "the miner would have a reasonable opportunity of being hired" for such work. Blankenship v. Beatrice Pocahontas Co., 3 BLR 1-773, 781 (1981) (describing, but rejecting, the Director's understanding that rebuttal under the "usual coal mine work" clause of § (b)(2) required such a showing), aff'd sub nom. Director, O.W.C.P. v. Beatrice Pocahontas Co., 698 F.2d 680 (4th Cir. 1983). The Director reversed his position only after, and solely because, two circuits rejected it. Brief for Director at 8, Crider v. Island Creek Coal Co., 723 F.2d 908 (Table) (6th Cir. 1983) (unpublished).

[20] As we have noted at pp. 6-7 supra, neither the ALJ, the Board, the panel in Taylor I, Peabody, nor the Director has suggested that Peabody might be able to defeat Taylor's claim under any rebuttal provision other than § 727.203(b)(2). Ap.

This concern is a factor weighing against the Court's selection of this case as a vehicle for resolving the §§ (b)(3)/(b)(4) issue. If the Court does not deny Peabody's petition here in its entirety, and decides to grant review of the §§ (b)(3)/(b)(4) issue in one of the pending cases, we submit that Bethenergy Mines, Inc. v. Director, O.W.C.P., 890 F.2d 1295 (3d Cir. 1989), petition for cert. filed sub nom. Pauley v. Bethenergy Mines, Inc., 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714), is the most appropriate vehicle for resolving that issue and the constitutional issue related to it. [21]

29a-40a; Ap. 25a-27a; Ap. 18a-22a. See also Dir. Op. Cert. Br. at 8 ("[T]his case turns on a narrow issue relating to the second rebuttal provision [§(b)(2)]"). Consequently, resolving Taylor's case did not require the court of appeals to decide whether Peabody had successfully defeated Taylor's claim under any of the other rebuttal provisions. Nor did the court have to decide the related constitutional issue. Thus, the court's discussions of §§ (b)(3) and (b)(4) and of the related constitutional issue are merely dicta. Cohens v. Virginia, 19 U.S. 6 (Wheat) 264, 399-400 (1821).

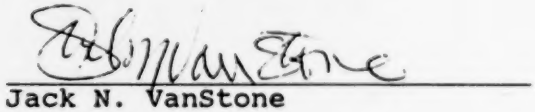
To be sure, in Meyer v. Zeigler Coal Co., 894 F.2d 902 (7th Cir. 1990), petition for cert. filed, _____ U.S.L.W. _____ (U.S. Apr. 27, 1990) (No. 89-7383), the court stated that it had "held in Taylor [II]...that § 727.203(b)(3) was invalid because it violated 30 U.S.C. § 902(f)(2)." Id. at 905 n.3. However, whether a court's statement is holding or dicta should be determined not by the court's characterization of the statement but by whether the court needed to decide the issue in question to resolve the case. United States v. Crawley, 837 F.2d 291, 292-93 (7th Cir. 1988).

[21] We are informed that petitioner Pauley in the Bethenergy Mines case (No. 89-1714) will file a reply to the briefs of the respondents in that case and will discuss, among other things, the reasons for her view that Bethenergy Mines is the most appropriate vehicle for resolving the §§ (b)(3)/(b)(4) issue and the constitutional issue related to it. We agree with what we understand the substance of that discussion will be. In addition, the Bethenergy Mines case is also one of the two pending cases that the Director calls "the strongest candidates

CONCLUSION

The Court should deny Peabody's petition for a writ of certiorari in its entirety. If the Court does not deny the petition here in its entirety, and grants review of the §§ 727.203(b)(3)/(b)(4) issue in one of the pending cases presenting that issue, then the Court should also grant review in this case of the § 727.203(b)(2) issue set forth as question 2 in this brief in opposition.

Respectfully submitted,



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for plenary consideration." Dir. Op. Cert. Br. at 15 n.7. We disagree with the Director concerning his other "candidate," Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-114). In our view, Dayton is not an appropriate vehicle for resolving the §§ (b)(3)/(b)(4) issue for reasons that, we understand, will also be set forth in petitioner Pauley's reply in the Bethenergy Mines case.

CERTIFICATE OF SERVICE

Jack N. VanStone hereby certifies that he is a member of the Bar of the Supreme Court of the United States, is the counsel of record for respondent Hubert C. Taylor herein, and that on August 8, 1990, he served three (3) copies of the attached Brief of Respondent Hubert C. Taylor In Opposition upon:

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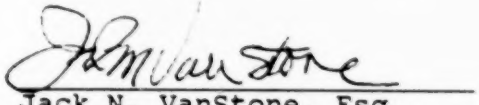
Service was made by depositing these copies in a United States mailbox in Evansville, Indiana, first class postage pre-paid, properly addressed to these parties.



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ORIGINAL

Nos. 89-1696, 89-1714, 90-113 and 90-114

Supreme Court, U.S.
FILED
SEP 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

PEABODY COAL COMPANY, et al., Petitioners,

v.

HUBERT C. TAYLOR, et al., Respondents.

HARRIET PAULEY, Survivor of JOHN C. PAULEY, Petitioner,

v.

BETHENERGY MINES, INC., et al., Respondents.

CLINCHFIELD COAL COMPANY, Petitioner,

v.

JOHN A. TAYLOR, et al., Respondents.

RECEIVED
SEP 21 1990
OFFICE OF THE CLERK
SUPREME COURT, U.S.

CONSOLIDATION COAL COMPANY, Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, et al., Respondents.

MOTION TO CONSOLIDATE

The undersigned counsel for the petitioners in Nos. 89-1696, 90-113 and 90-114 and for the respondent BethEnergy Mines, Inc. in 89-1714 respectfully move, in accordance with Supreme Court Rule 21, that these four pending petitions for certiorari be consolidated for such further consideration as may be accorded to them by the Court. It is further moved, should certiorari be granted, that the Court order consolidated briefing and argument under such terms and conditions as the Court thinks appropriate in accordance with Supreme Court Rule 27.3. This motion should be granted for the following reasons.

I.

Several thousand federal black lung benefits claims, filed before April 1, 1980, are now well into their second decade of litigation. The most significant reason for the inability of the system to finally resolve these old cases is the difficulty experienced by the courts of appeals in reaching agreement on the identity and meaning of the eligibility criteria to be applied in the cases. The continuation of these unfortunate circumstances is not necessary, as this Court is now presented with the opportunity to bring them to an end. These movants reasonably believe that consolidation is most likely to achieve this worthwhile goal, while piecemeal disposition of the four cases may instead require renewed requests for this Court's intervention in the future, and further prolong the litigation of many cases that should have been resolved long ago.

II.

The four petitions present distinct, but closely related, disagreements among the circuits. The Sixth Circuit and the Seventh Circuit disagree over the validity of 20 C.F.R. § 727.203(b), to the extent that this rule permits rebuttal of the Department of Labor ("DOL") black lung interim presumption if a rebuttal fact is proven in light of all relevant medical evidence. Compare Youghiogheny and Ohio Coal Co. v. Milliken, 866 F.2d 195, 202 (6th Cir. 1989), with Taylor v. Peabody Coal Co. II, 892 F.2d 503, 507 (7th Cir. 1989). The Third Circuit and Fourth Circuit disagree over whether 20 C.F.R. § 727.203(b)(3) is a valid rule. Compare BethEnergy Mines, Inc. v. Director, Office of Workers' Compensation Programs, 890 F.2d 1295 (3d Cir. 1989), with Taylor v. Clinchfield Coal Co., 895 F.2d 178, 183 (4th Cir. 1990). The Fourth Circuit, in Taylor v. Clinchfield Coal Co. and Dayton v. Consolidation Coal Co., 895 F.2d 173 (4th Cir. 1990), has invalidated DOL rebuttal rule 20 C.F.R. § 727.203(b)(4). The Seventh Circuit's holding is generally in accord. It is, however, fairly apparent that the Third Circuit and Sixth Circuit would uphold this rule.

The principal question to be answered in all the pending petitions is whether the Black Lung Benefits Act, 30 U.S.C. §§ 901-945, prohibits DOL from writing an interim presumption according mine operators a fair opportunity to rebut any presumed fact in light of whatever evidence is indicative of the truth or falsity of that fact. The four cases together provide a reasonably complete diagram of the contours of the question. No one of the

cases standing alone ensures a final resolution. All four cases are properly postured for consideration of the principal question and no one of them is controlled by its individual facts.

Mrs. Pauley does not dispute the fact that her husband's disability was wholly unrelated to black lung disease. She argues only that this fact is legally irrelevant. Hubert Taylor never challenged the ALJ's conclusion that the evidence established rebuttal under section 727.203(b)(2) of the DOL rule.[1] In John Taylor, the only operative facts within the scope of the petition for certiorari and the Fourth Circuit's decision are that Taylor does not have pneumoconiosis or any disability related to the disease. In Dayton, the only operative facts are that Dayton does not have either pneumoconiosis or any disability for work.[2] There is no need for a printing of a joint appendix in any or all of the cases.

Pauley addresses DOL's third method of rebuttal. John Taylor addresses the third and fourth methods and also addresses a method of invocation not addressed in Pittston Coal Group v. Sebben, 488

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[1] In responding to Peabody's petition for certiorari, Taylor argues for the first time that the ALJ's section 727.203(b)(2) rebuttal finding was in error. Brief for Respondent Hubert Taylor in Opposition at 9-13. This was not raised in the prior trip to this Court, two trips to the court of appeals or before the Benefits Review Board or the ALJ. It is not within the scope of the issues presented and Hubert Taylor's failure to present the matter to the agency constitutes a failure to exhaust his administrative remedies. The decision in this regard is final and should not be considered by this Court. See Hoover v. Ronwin, 466 U.S. 558, 574 n.25 (1984).

[2] John Taylor and Dayton were proper subjects for a joint petition for certiorari in accordance with Supreme Court Rule 12.2. This was not accomplished for reasons that are non-germane to the issues or the positions of the respective petitioners.

U.S. 105 (1988). Dayton directly addresses the fourth method. Hubert Taylor addresses the relevance of medical evidence across the Board and touches on the second method. A complete resolution of the tensions between the SSA presumption, 20 C.F.R. § 410.490, and the DOL regulation can be accomplished within the parameters of these four cases. In Pittston Coal Group, this Court needed to resolve only one segment of the puzzle. It is respectfully urged that the Court take this opportunity to complete the solution.

III.

DOL urges this Court to select one case or another with the hope that a simplified approach will be good enough, assuming perhaps that the Court's guidance in any one of the cases will prove sufficient for the resolution of the rest.[3] This is a risky assumption that is not supported historically in the black lung decisional law of the courts of appeals. Just as Pittston Coal Group did not genuinely compel any definitive conclusion in these four cases a piecemeal resolution of the remaining issues by this Court may only lead to additional years of litigation.

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[3] The Government is properly concerned with the unreported death of Hubert Taylor during the pendency of his 1987 petition for certiorari in this Court, and the unreported death of John Pauley during his Benefits Review Board appeal. Since both cases still involve statutory parties who are entitled to collect whatever benefits were due to the deceased individuals, and in light of the reasonable steps taken to accomplish substitution nunc pro tunc, the abatement of Pauley's claim and Hubert Taylor's claim should not be required. If the Court deems the two cases to have abated, it is then requested that the two Fourth Circuit cases be consolidated for whatever purposes are appropriate.

CONCLUSION

For these reasons, it is respectfully requested that this Motion be granted.

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(8)

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No. 89-1696

In The
Supreme Court of the United States
October Term, 1990

PEABODY COAL COMPANY AND
OLD REPUBLIC INSURANCE COMPANY,

Petitioners,

v.

HUBERT C. TAYLOR AND DIRECTOR, OFFICE
OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR,

Respondents.

RESPONDENT TAYLOR'S STATEMENT IN OPPOSITION TO THE COAL COMPANIES' MOTION TO CONSOLIDATE NOS. 89-1696, 89-1714, 90-113, AND 90-114

Two separate circuit conflicts respecting the validity or scope of the rebuttal provisions of the Department of Labor ("DOL") interim regulation at 20 C.F R. § 727.203(b) exist. Taylor's Op. Cert. Br. at 8, 13-14. One involves the proper scope of the rebuttal provision at § 727.203(b)(2) (the "§ (b)(2) issue"). Id. The second involves the validity of the rebuttal provisions at §§ 727.203(b)(3) and (b)(4) (the "§§ (b)(3)/(b)(4) issue"). Id. This case is the only case pending before the Court that presents the § (b)(2) issue. Five cases pending before the Court, including this one, are part of the circuit conflict respecting the §§ (b)(3)/(b)(4) issue. [1]

[1] In addition to this case, these cases are Bethenergy Mines, Inc. v. Director, O.W.C.P., 890 F. 2d 1295 (3rd Cir. 1989), petition for cert. filed 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714); Dayton v. Consolidation Coal Co., 895 F. 2d

Four coal companies (the "coal companies") have now jointly filed a motion with this Court to consolidate all four of the cases in which they are parties (Nos. 89-1696, 89-1714, 90-113, and 90-114). Their motion should be denied insofar as it pertains to this case.

1. If this Court decides to resolve the existing circuit conflicts respecting the DOL rebuttal provisions, the coal companies request the Court to do so by affording plenary review in all four cases, including this one, in which they are parties. We submit that the Court should deny the coal companies' request, at least insofar as they include this case among those they want consolidated. Motion at 1. In our brief in opposition to certiorari, we explained (at 8-13) why plenary review of the Seventh Circuit's decision here is inappropriate. We showed that Peabody could not establish rebuttal under any of the DOL rebuttal provisions even if all of them were applied to Taylor's case, so that the judgment of the court of appeals is correct without regard to either of the questions that petitioner Peabody Coal raised in its petition. Neither Peabody nor the Director has even attempted to counter our showing to that effect, [2] on which

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173 (4th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-114); Robinette v. Director, O.W.C.P., 902 F. 2d 1566 (4th Cir. 1990), petition for cert filed, 59 U.S.L.W. 3073 (U.S. July 25, 1990) (No. 90-172); Taylor v. Clinchfield Coal Co., 895 F. 2d 178 (4th Cir. 1990), petition for cert. filed, 59 U.S.L.W. 3055 (U.S. July 17, 1990) (No. 90-113).

[2] Peabody has not filed any reply to our brief in opposition. Nor do the coal companies, as a group, challenge our showing to that effect in the motion to consolidate. To be sure,

we stand as our principal response to the consolidation motion.

2. In our brief in opposition, we also argued (at 13-26) that if this Court did not deny Peabody's petition here in its entirety, and granted plenary review of the §§ (b)(3)/(b)(4) issue in one of the other pending cases properly presenting that issue, then (and only then) it should grant review here of the § (b)(2) issue. Our opposition to the motion to consolidate is consistent with that argument. Specifically, we agree with the Director and petitioner Pauley in No. 89-1714 that it is not necessary to grant plenary review in more than one case to resolve the circuit conflict respecting the §§ (b)(3)/(b)(4) issue. Dir. Resp. Br. in Dayton (No. 90-114) at 7 and n. 3; Reply Br. for Petitioner in Bethenergy Mines (No. 89-1714) at 5-9.

3. We also agree with petitioner Pauley that to grant review in several of the cases addressing the DOL rebuttal provisions would promise manageability problems for the Court and the parties. Reply Br. for Petitioner in Bethenergy Mines (No. 89-1714) at 4. At the same time, we submit that if this Court granted plenary review in just one case to resolve the §§

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the coal companies' joint motion contends in passing that Taylor did not properly raise in the proceedings below the argument that the ALJ erred in concluding that Peabody had rebutted the DOL interim presumption under the rebuttal provision at § 727.203(b)(2). Motion at 3 and n. 1. But the coal companies' contention to this effect is wrong. Indeed, Taylor's primary argument below was that the ALJ's § 727.203(b)(2) finding was erroneous because, in violation of Section 402(f)(2) of the Black Lung Benefits Act, the ALJ construed § 727.203(b)(2) of the DOL interim regulation to entail a test that was more restrictive to black lung claimants than the proper test under § 410.490(c)(2), the companion provision to § 727.203(b)(2).

(b)(3)/(b)(4) issue,[3] and then granted review in this case to resolve the § (b)(2) issue, neither the Court nor the parties would be unduly burdened. Moreover, if the Court did grant plenary review in Bethenergy Mines to resolve the §§ (b)(3)/(b)(4) issue, see note 3 supra, and in this case to resolve the § (b)(2) issue, then it would be appropriate to consolidate the two cases. However, if the Court orders such a consolidation, it should permit the claimants in the two cases to file separate briefs, thereby allowing full exploration of the §§ (b)(3)/(b)(4) issue on the one hand and the § (b)(2) issue on the other.

Respectfully submitted,

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[3] We agree with petitioner Pauley that Bethenergy Mines (No. 89-1714) is the most appropriate case for resolution of the §§ (b)(3)/(b)(4) issue and the constitutional issue related to it.

CERTIFICATE OF SERVICE

Jack N. VanStone hereby certifies that he is a member of the Bar of the Supreme Court of the United States, is counsel of record for Hubert C. Taylor, and that on September 25, 1990, he served a copy of the attached Statement upon:

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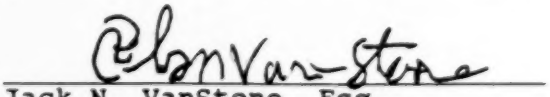

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